UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

READY MIX USA, LLC,

and	**Cases**	**10–CA–140059**
		10–CA–143601
		10–CA–145224
INTERNATIONAL BROTHERHOOD OF		**10–CA–147703**
TEAMSTERS, LOCAL 402.		**10–CA–148185**

Counsel:

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DECISION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. These cases involve a series of disputes arising in the wake of a union's October 2014 election and certification as the bargaining representative of the employees at a Huntsville, Alabama cement manufacturing facility.

Specifically, the government alleges that the employer violated the National Labor Relations Act (Act) in the following ways, by: (1) by maintaining overly broad rules restricting solicitation and distribution of materials; (2) in two instances interrogating an employee about union matters; (3) unilaterally implementing a "Drive-Cam" system in employee work vehicles without providing the union prior notice and an opportunity to bargain over its effects; (4) failing and refusing to provide the union with requested information regarding the Drive-Cam system; (5) discharging an employee for disciplinary reasons without providing the union prior notice and an opportunity to bargain over the discharge and its effects; and (6) refusing to meet and/or collectively bargain with the union if Jerry Davis, an employee and member of the union's negotiating committee, was to be present at bargaining sessions.

As discussed in depth below, I find that the employer has violated the Act as alleged with regard to items (1), (3), and (6). With regard to item (4) I find that the employer unlawfully failed to provide one piece of requested information but unlawfully delayed providing three others and that under Board precedent no amendment to the complaint allegations is required to reach these conclusions of unlawful delay. I dismiss items (2) and (5).

STATEMENT OF THE CASE

On October 30, 2014, the International Brotherhood of Teamsters, Local 402 (Union) filed an unfair labor practice charge alleging violations of the Act by Ready Mix USA LLC (Ready Mix or Employer or Respondent), docketed by Region 10 of the National Labor Relations Board (Board) as Case 10–CA–140059. An amended charge was filed by the Union on March 16, 2015, and a second amended charge filed April 15, 2015. The Union filed a charge, docketed by Region 10 of the Board as Case 10–CA–143601 on December 23, 2014. An amended charge in that case was filed April 8, 2015. On January 28, 2015, the Union filed an unfair labor practice charge docketed by Region 10 as Case 10–CA–145224. An amended charge in that case was filed April 15, 2015. On March 6, 2015, the Union filed an unfair labor practice charge docketed by Region 10 as Case 10–CA–147703. The case was the subject of an amended charge filed by the Union on April 15, 2015. On March 16, 2015, the Union filed an unfair labor practice charge docketed by the Region as Case 10–CA–148185.

Based on an investigation into these charges, on May 7, 2015, the Board's General Counsel, by the Regional Director for Region 10 of the Board, issued an order consolidating the above-referenced cases and a consolidated complaint and notice of hearing alleging that Ready Mix had violated the Act. An amended order consolidating cases and issuing a consolidated complaint and notice of hearing was filed by the General Counsel on May 14, 2015. (Throughout this decision I refer to the extant consolidated complaint as the complaint.) Ready Mix filed an answer denying all alleged violations of the Act on May 27, 2015. Its answer included a motion for a more definite statement regarding paragraph 8 of the complaint.

A trial was conducted in this matter on July 6 and 7, 2015, in Huntsville, Alabama. At the commencement of the hearing I denied Ready Mix's motion for a more definite statement, for the reasons stated in the record (Tr. 11–12).[1]

Counsel for the General Counsel and Ready Mix filed post-trial briefs in support of their positions by August 12, 2015. On the entire record, I make the following findings, conclusions of law, and recommendations.

JURISDICTION

Ready Mix is a Delaware corporation with an office and place of business in Huntsville, Alabama. Ready Mix is engaged in the manufacture and nonretail sale of cement at its Huntsville, Alabama place of business (the Huntsville facility). During the twelve months preceding May 14, 2015, which Ready Mix admits is a representative period, Ready Mix, in conducting its operations at the Huntsville facility, purchased and received at the Huntsville facility goods valued in excess of $50,000 directly from points outside the State of Alabama. At all material times Ready Mix has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

[1] At the commencement of the hearing, counsel for the General Counsel moved (without objection) and I granted the motions, to delete ¶7(c) of the complaint, and to change the date set forth in ¶11 from January 22 to January 20. Also, at the commencement of the hearing counsel for the General Counsel represented that Case 10–CA–143609, which was pled in the complaint (¶1(g)) and listed in the caption, was inadvertently included in the pleadings. I ordered the caption amended to remove the case. I now amend the complaint to delete ¶1(g) and remove the reference to the case in the amended order consolidating cases.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

Below, I make findings as to background matters and then turn to findings and analysis as to each allegation of unlawful conduct advanced by the General Counsel.

Background

Ready Mix produces, sells, and supplies concrete in various states in the southeastern United States. Its "parent" company is CEMEX, a national construction materials supply company that owns Ready Mix. Witnesses described Ready Mix as "a part of CEMEX" and "a region of CEMEX."

Ready Mix maintains a number of facilities in Alabama, including one in Huntsville. On October 17, 2014, the Union won a representation election, with 19 employees voting. Based on the results of this election, on October 30, 2014, the Union was certified by the Board as the exclusive collective-bargaining representative of the following unit of employees:

> All regular part-time and full -time drivers, loaders, dispatchers, and mechanics, employed by the Employer at its 2020 Vermont Road, Huntsville, Alabama 35806 facility; but excluding all office clerical employees, professional employees, managers, guards and supervisors as defined in the Act.

The Union requested bargaining on November 4, 2014. The parties met for their first collective-bargaining session on January 13, 2015. They met again four times before the hearing in this matter: February 24, April 14, June 8, and 25.

Attorney Arthur Silbergeld, Ready Mix Director of Human Resources Charles O'Reilly, and Ready Mix District Operations Manager Ron Senyeri, represented Ready Mix at the negotiating sessions.

The Union was represented by the Union's Secretary/Treasurer and business agent, Joe Gronek, Attorney Sam Morris, International Union Business Representative Stu Helfer, and, during the first two negotiating sessions, by Ready Mix Huntsville employee Jerry Davis, who had been the union's election observer during the representation election.

As described below, after the February 24 meeting, Ready Mix conditioned bargaining on the Union's agreement that Davis would not be present. Huntsville employee Joe Carlisle joined Gronek at the bargaining table for the Union at the June 25 meeting (Morris and Helfer do not appear to have attended that meeting).

A. 8(a)(1) issues

1. Unlawfully overbroad work rules

The government alleges and Ready Mix admits (GC Exh. 1(s), (x) at ¶¶7) that for at least six months preceding March 16, 2015 (the date of the filing of the unfair labor practice charge in Case 10–CA–148185) Ready Mix has maintained the following rules:

1. In Section B of its "CEMEX Work Rules":

> The following offenses can lead to dismissal at the discretion of the management, on the first or any subsequent recurrence after the employee has been notified by his supervisor that the offense has been made. A record of this notification will be incorporated in the personnel records of the employee at the time it is given.
>
> * * * * 12. Solicitation or distribution of any non-work related materials without supervisor's permission.

2. In its Ready Mix USA, LLC Manual (June 10, 2010):

> RULES OF CONDUCT
>
> Prohibited conduct which may subject an employee to disciplinary action, including immediate termination or demotion without notice or warning include, but are not limited to, the following described conducts. The disciplinary action taken will depend upon the nature and severity of the circumstances.
>
> * * * * 31. Solicitation or distribution of <u>unauthorized</u> materials or products to employees or customers on Company property (emphasis in original).

Based on the testimony, the Ready Mix manual appears to have been included in (or be) the handbook distributed to employees at all Ready-Mix locations. (Tr. 286–287, 288–289.) The record does not state where the Section B CEMEX Work rules are distributed. As part of the CEMEX policies, the evidence indicates that they are available to employees on the company's intranet site by request. (Tr. 289.) Given that this is a CEMEX "work rule," and therefore part of work rules that O'Reilly testified (with specific discussion of a different work rule) that apply to all CEMEX-affiliated facilities, including all Ready-Mix facilities, I find that this work rule is available on request, through the intranet to all Ready Mix employees at the Respondent's various facilities.

In addition, as set forth at trial, there is a CEMEX solicitation, distribution, and vending policy, dated as "approved" on November 10, 2008, maintained for CEMEX, of which Ready Mix is a part. It states, in pertinent part:

> CEMEX recognizes that employees may have interest in events and organizations outside the work place. Employees, however, may not engage in solicitation during work time for any purpose. In addition, company employees may not engage in distribution or vending during work time or in working areas for any purpose. Work time is all time on the company premises other than before and after work, at meal periods and at break times.

Ready Mix's director of HR, Charles O'Reilly, testified that this CEMEX policy applies to all CEMEX-affiliated facilities, which includes all Ready Mix facilities. Unlike the June 10, 2010 Ready Mix solicitation rule (set forth above) which, as part of the rules of conduct is contained "in the previous employee handbooks," the CEMEX policies, such as the 2008 CEMEX solicitation policy, are available on CEMEX's intranet system "by request."

During collective-bargaining negotiations with the Union, in the meeting, conducted June 8, 2015, Ready Mix proposed changes to the CEMEX policy and discussed the new proposal with the Union.[2] The Union did not agree to the new proposal in that meeting, or on June 25, the final bargaining session before the hearing in this matter.

Analysis

The General Counsel alleges that the two rules enumerated above—rule B.12 from the CEMEX work rules, and rule of conduct 31 from the Ready Mix manual (dated June 10, 2010)—are violative of Section 8(a)(1) of the Act. The Respondent admits that it does and has maintained these rules.

Section 7 of the Act provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .

If a work rule explicitly restricts Section 7 rights, it is unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). These do not.

If the work rule does not explicitly restrict Section 7 rights "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647.

In the instant case, there is no allegation that the challenged work rules were promulgated in response to union activity. There is also no claim that the rules have been discriminatorily applied. Rather, in this case the claim is that the challenged rules reasonably would be construed

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[2]The new proposal stated:

> Limits on Solicitation and Distribution
>
> To protect you and our customers from unnecessary interruptions and annoyances, it is our policy to prohibit the distribution of paper literature in work areas and to prohibit solicitation and distribution of literature during employees' working time. "Working Time" is the time an employee is engaged or should be engaged in performing his /her work tasks for Ready Mix. These guidelines also apply to solicitation by electronic means, and to distribution by electronic means during employees' working time. Solicitation or distribution of any kind by non - employees on Company premises is prohibited at all times. Nothing in this section prohibits employees from discussing terms and conditions of employment.

by employees to prohibit Section 7 activity. Thus, "the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights." *Hyundai American Shipping Agency*, 357 NLRB No. 80, slip op. at 2 (2011); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enf'd. 203 F.3d 53 (D.C. Cir. 1999). Notably, in cases such as this one, "[a]s the mere maintenance of the rule itself serves to inhibit the employees' engaging in otherwise protected organizational activity, the finding of a violation is not precluded by the absence of specific evidence that the rule was invoked as any particular date against any particular employee." *Farah Mfg. Co.*, 187 NLRB 601, 602 (1970), enf'd. 450 F.2d 942 (5th Cir. 1971). For "[i]t is It is well settled that an employer may violate Section 8(a)(1) through the mere maintenance of work rules, even in the absence of enforcement or evidence that the rules were implemented in violation of Section 7, as the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights." *New Passages Behavioral Health*, 362 NLRB No. 55, slip op. at 1 (2015) (and cases cited therein).

Employees' rights under Section 7 to distribute materials and solicit coworkers on the employer's property are well established in Board and Supreme Court precedent. There can be no question but that the employer work rules cited above are presumptively unlawful under long-settled Board precedent.

The Supreme Court has long recognized that "the right of employees to self-organize and bargain collectively established by § 7 of the [Act] necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978). As the Supreme Court has recognized, the workplace "is a particularly appropriate place for the distribution of § 7 material, because it 'is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.'" *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978) (court's parenthetical), quoting *Gale Products*, 142 NLRB 1246 (1963).

Thus, rules that ban employee Section 7 solicitation at an employer's facility that apply to nonworking areas during nonworking time are presumptively unlawful:

> time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline. [Internal quotations omitted.]

NLRB v. Republic Aviation Corp., 324 U.S. 793, 803–804 fn. 10 (1945) (quoting *Peyton Packing Co.*, 49 NLRB 828, 843–844 (1943)).

Similarly, a rule prohibiting distribution of literature on employees' own time and in nonworking areas is presumptively invalid. See, e.g., *Our Way, Inc.*, 268 NLRB 394 (1983); *Stoddard-Quirk Mfg.*, 138 NLRB 615 (1962). A no-distribution rule which is not restricted to working time and to work areas is overly broad and presumptively unlawful. See, e.g., *MTD Products, Inc.*, 310 NLRB 733 (1993).

Moreover, a rule providing for management approval for distribution is antithetical to Section 7 activity and a reasonable employee will be chilled from even asking. *Teletech Holdings, Inc.*, 333 NLRB 402, 403 (2001) ("any distribution rule that requires employees to secure permission from their employer prior to engaging in protected concerted activities on an employee's free time and in nonwork areas is unlawful").

The Respondent's rules, cited above, with their blanket prohibition on solicitation of unauthorized materials and requirement that the distribution or solicitation of "non-work"-related materials receive a supervisor's permission, are, without question, presumptively overbroad and unlawful. And the Respondent has offered nothing at all in the way of special circumstances that would defeat that presumption by demonstrating that these overly broad rules are necessary to maintain production or discipline. See *Republic Aviation*, supra.

The Respondent's defense to these allegations is that it maintains a third rule, the 2008 CEMEX solicitation and distribution policy, more reasonable (in terms of longstanding Board precedent), that is available to employees "upon request" and available through the Employer's intranet system. The Respondent argues that the two challenged policies are subject to the third, and contends that when read in conjunction with this third policy, "any apparent defects in the [other two policies] are cured when viewed in the full context, as required by law." (R. Br. at 11). According to the Respondent, "[r]eading the three policies together, it is clear that what is meant [in the first two policies] by distribution or solicitation that is 'unauthorized' or 'without [a] supervisor's permission' does *not* include actions permitted under the NLRA, as the CEMEX policy makes clear such conduct is authorized." (Id. at 10, emphasis and bracketing in original).

The argument is a nonstarter. It is meritless in a couple of different ways.

First, as a matter of fact—by which I mean by any reasonable reading—the addition of the 2008 CEMEX solicitation policy to the discussion renders the Respondent's overall contextualized solicitation/distribution *more restrictive not less* and, more to the point, does absolutely nothing to cure the unlawfulness of the rules challenged by the General Counsel.

The CEMEX work rule unlawfully bars solicitation or distribution "without supervisor's permission." The Ready Mix rule of conduct bars solicitation or distribution of "unauthorized materials." The 2008 CEMEX solicitation/distribution policy prohibits solicitation/distribution during working time (as defined) and in working areas. Thus, the intrepid employee that thought to request a copy of that policy from a member of the Employer's human resources department (Tr. 288–289) would learn for the first time from reading it that *even with a supervisor's permission* and *even with regard to authorized materials* he was prohibited from soliciting during working time and in working areas. At the same time, nothing in the 2008 solicitation policy affirmatively permits solicitation or distribution without supervisory permission and nothing in the 2008 solicitation policy provides a guide for what materials are authorized to be distributed. In other words, as a matter of English, a synthesis of the three rules leaves the unlawful prohibitions in the first two rules untouched. The incorporation of the third rule simply adds an additional prohibition—without regard to authorization or permission--on solicitation and/or distribution during working time and in working areas.[3]

[3]I note that O'Reilly's testimony (Tr. 285–286), in which he suggests that he is of the opinion that the 2008 CEMEX policy "defines" the more recently-enacted policies, is of no consequence, even assuming it is true. The issue is an objective one, whether the challenged rules "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Hyundai American Shipping Agency*, supra. As a matter of reading, the 2008 CEMEX policy does not touch on much less contradict the unlawful portions of the rules of conduct and work rules.

Second, the Respondent's argument is wrong as a matter of law, and this would be so even if the 2008 policy could be read to mitigate the unlawful portions of the handbook rules. The Respondent is entirely correct that rules must be read in context.[4] But the challenged handbook rules make no reference to the 2008 policy, and there is no evidence that the Employer took any steps to explain to employees that the challenged policies do not mean what they reasonably would be read to mean, or that they are "defined" elsewhere. Even assuming, very wrongly, as I have pointed at above, that the 2008 policy lawfully restated the unlawful portions of the challenged policies, the result would be an ambiguity, which is construed against the employer as promulgator of the rule. *Lily Transportation Corp.*, 362 NLRB No. 54 fn. 3 (2015); *Norris/ O'Bannon*, 307 NLRB 1236, 1245 (1992); see, *Lafayette Park Hotel*, 326 NLRB at 828 (even if rule not intended to reach protected conduct, its lawful intent "must be clearly communicated to employees"); enf'd. mem. 203 F.3d 52 (D.C. Cir. 1999); *Teletech Holdings*, supra at 403 ("When a rule of this kind is found presumptively unlawful on its face, the employer bears the burden to show that it communicated or applied the rule in a way that conveyed a clear intent to permit distribution of literature in nonworking areas during nonworking time. A clarification of an ambiguous rule or a narrowed interpretation of an overly broad rule must be communicated effectively to the employer's workers to eliminate the impact of a facially invalid rule") (citations omitted); see *Hyundai America Shipping Agency*, 357 NLRB No. 80, at slip op. 12.

Indeed, in a recent case the Board rejected a contention essentially identical to the Respondent's here. In *Lily Transportation Corp.*, 362 NLRB No. 54, slip op. at 1 and 6–7 (2015), the Board rejected the employer's contention that a facially unlawful single-sentence rule in an "inappropriate conduct" provision regarding disclosure of confidential information was lawful when "read in the larger context of the employer's confidentiality policy statement context, and when read together, employees would not reasonably construe the rule to also prohibit discussing wages and other terms and condition of employment." *Lily Transportation*, supra at slip op. 6. In reasoning adopted by the Board, and equally applicable to the argument advanced by the Respondent in this case, the administrative law judge in *Lily* rejected the employer's contention:

> The problem with the Respondent's argument is that we are not dealing with the lawfulness of the "Confidentiality of Information" policy in the handbook at pages 8, 9 but rather with the facial challenge of the single sentence under the "Inappropriate Conduct" provision in the handbook at pages 23, 24.
>
> The [unlawful 'inappropriate conduct' statement of the handbook] does not reference the [other] confidentiality of information policy located towards the front of the handbook. Employees would not necessarily understand that the inappropriate conduct statement refers to the confidential policy statement. The inappropriate conduct statement does not refer to or reproduces the confidentiality of information policy statement. Employees would reasonably assume that the [unlawful inappropriate conduct statement] standing alone could result in discipline. It is unlikely that employees reading this sentence would also search the handbook and derive a narrower interpretation of the prohibited disclosure of information by reading the two separate provisions together, especially in light of the fact, that the confidentiality statement is located at the front of the handbook

[4] "In determining whether a challenged rule is unlawful, the Board must . . . give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage Village-Livonia*, 343 NLRB at 646.

> while the violation for disclosing of employee information is one of numerous conduct violations printed near the end of the handbook.
>
> Accordingly, I find that the Respondent's maintenance of [the confidentiality portion of the inappropriate conduct provision] has a reasonable tendency to inhibit employees' protected activity and, as such, violates Section 8(a)(1).

354 NLRB No. 54, at slip op. 7 (citation omitted).

In the same way that the unlawful provision in the back of the handbook did not reference the lawful confidentiality provisions in the front of the handbook in *Lily Transportation*, here the challenged CEMEX work rules and Ready-Mix rules of conduct do not reference the more reasonable 2008 CEMEX distribution/solicitation policy. Thus, as in *Lily*, "Employees would reasonably assume that the [challenged rules] standing alone could result in discipline." And this is far more true here than it was *Lily Transportation*: in *Lily Transportation* the Board found it "unlikely that employees reading the [offending] sentence would also search the handbook and derive a narrower interpretation of the prohibited [rule] by reading the two separate provisions together, especially in light of the fact, that the [lawful] statement is located at the front of the handbook while the [unlawful rule] is . . . printed near the end of the handbook." Here, while at least one of the unlawful rules is in the employee handbook, the allegedly redeeming CEMEX distribution/solicitation policy is not—it is on the Employer's intranet and available "upon request" (Tr. 288–289). CEMEX's maintenance of a third, assumedly lawful distribution/solicitation policy does not vitiate the unlawfulness of the challenged policies.[5]

2. *Alleged Interrogations*

Jeremy Franko worked for Ready Mix from September 2007 until March 2015. Franko worked as a dispatcher in Ready Mix's Trinity, Alabama facility. Near the end of his employment, central dispatch was moved to Decatur, Alabama, and in March, Franko was asked to train some new truck drivers and then report to Ready Mix's Athens, Alabama facility. There, at the time he ceased employment, he was training the manager who would be designated plant manager for the Huntsville facility.

Franko testified that in two instances, in January 2015, he was asked by Ready Mix District Operations Manager Ron Senyeri whether he had heard anything about "conversations" or "talk" about the Union in Huntsville. Franko testified that these questions were put to him by Senyeri while they were together in the office trailer at Ready Mix's Trinity facility. Franko testified that in both instances he answered truthfully. In the first instance he told Senyeri no, he had not heard anything. In the second instance he told him yes, that he "heard a couple of drivers talking about it at the time clock, . . . clocking out, just shooting the breeze, and they clocked out and left. That was it." Franko testified that Senyeri "asked me if I knew who they were, and I told him I don't remember who it was." Franko also agreed that Senyeri asked if there were any questions about the Union in Huntsville, and testified that the drivers he overheard discussing the Union as they clocked out were discussing some unidentified "confusion" regarding the Huntsville election.

[5] At trial, the Respondent elicited testimony (Tr. 291–292) and introduced a bargaining proposal (R. Exh. 47) offered to the Union on June 8 that sought to revise the solicitation/distribution policy. Although the argument is not pursued on brief, I note that even a union's affirmative agreement to maintenance of an unlawful solicitation/distribution rule—which did not occur here—is not a defense to an employer's liability. *NLRB v. Magnavox*, 415 U.S. 322 (1974).

For his part, Senyeri testified and did not deny the pertinent parts of Franko's testimony.[6] He agreed that he spoke with Franko about "feedback" on costumer issues or "employee morale." He called this "typical" because "our dispatchers are with our drivers" at many locations. "Sometimes they may hear complaints and issues that may pop up that maybe a plant manager wouldn't hear." Senyeri testified that in the Fall of 2014, Franko had asked him "what's going on in Huntsville, some of the guys have been talking about a union there." Senyeri testified that he said "well, yeah, that's what's going on, and I asked him does anybody need to ask me any questions; I could be available or would be available at some point in time." Senyeri testified that he asked Franko when he saw him at the Trinity plant if "any of the guys have any more questions concerning the Union; I'm here . . ."

Based on this testimony, I credit Franko's testimonial account. It was credibly offered. And, as discussed, Senyeri did not deny it, but rather gave an account that admitted that it was "typical" to inquire with dispatchers such as Franko about "employee morale," and that he asked Franko whether he knew of any employees who had questions concerning the Union. Seneyri's nondenial adds credence, beyond demeanor, to Franko's account.

Analysis

The complaint alleges that in two instances, mid-November 2014 and late November or early December 2014, at the Trinity facility, Ron Senyeri "interrogated" an employee about the employee's union membership, activities, and sympathies, and the union membership, activities, and sympathies of other employees.

Based on the testimony, there were no questions at any time by Senyeri regarding, or likely to reveal, Franko's membership, activities, or sympathies. Hence that portion of the complaint can be quickly dismissed. In addition, while the dates alleged in the complaint do not match the testimony that does not bar the General Counsel's claim.[7]

The closer question is whether, as alleged, Senyeri's interaction with Franko amounted to an unlawful interrogation by asking about other employees.

It is well established that not every interrogation is unlawful under the Act. Whether the questioning of an employee constitutes an unlawful coercive interrogation must be considered under all the circumstances and there are no particular factors "to be mechanically applied in each case." *Rossmore House*, 269 NLRB 1176, 1178, enf'd. 760 F.2d 1006 (9th Cir. 1985); *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). While the Board has identified a

[6]Senyeri denied (Tr. 257) asking Franko for the names of anyone "doing union organizing," asking him if "anyone supported the Union," or asking him to "report to management any employees who supported or sympathized with the Union." These denials do not go to the substance of Franko's testimony.

[7]As the Board has explained, "Scrupulous adherence to dates alleged in a complaint is not necessarily required, and to do so here would elevate form over substance." *Smurfit-Stone Container Enterprises*, 357 NLRB No. 144, slip op. at 5 fn. 36 (2011) (citation omitted) (citing *Salon/Spa at Boro, Inc.*, 356 NLRB No. 69, slip op. at 18–19 (2010)), enf'd. 594 Fed. Appx. 897 (9th Cir. 2014). I do not find the deviation in dates alleged in the complaint from the evidence an impediment to a finding of a violation. Having said that, I do believe the date of the alleged interrogations described by Franko—months after the representation election and the union's certification—to be a factor in assessing the coerciveness of the questions posed by Senyeri.

number of factors that are “useful indicia” in determining whether the questioning of an employee constitutes an unlawful interrogation,[8] the Board has explained that "[i]n the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act." *Westwood*, supra at 940; *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).[9]

In this case, the allegation of unlawful conduct rests on two instances in January 2015, when Senyeri asked Franko if there was any union “talk” in Huntsville. In one of the two instances Franko told Senyeri that he had heard two employees “shooting the breeze” about the Union as they clocked out. In that instance, Senyeri asked if Franko knew who they were. Franko told him, truthfully, that he did not recall.

If this were part of a larger pattern of employer hostility and discrimination toward employees engaged in union activity, I might consider this coercive. If Senyeri’s statements appeared to be part of a determined or systematic effort to put Franko in the position of informing on union activity, or finding out from Franko which employees supported the union or were engaged in union activity, I would be likely to consider this coercive. But alone, in isolation, I do not find that an employee in Franko’s position would reasonably tend to be threatened, coerced or restrained by these interchanges. They contained no suggestion of threat or coercion or indication that the information would be used against others.

Senyeri, no doubt, is an important official at Ready Mix, and this certainly weighs in favor of finding a violation. But the remaining *Bourne* factors all weigh against finding a violation. Senyeri worked closely with Franko, spoke to him on a daily basis, and both conversations

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[8] *Westwood Health Care Center*, 330 NLRB 935, 939 (2000), quoting *Perdue Farms Inc. v. NLRB*, 144 F3d. 830, 835 (D.C. Cir. 1998). These include the "Bourne factors," enunciated in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964), and set forth in *Westwood Health Care Center*, supra at 939:

> (1) The background, i.e. is there a history of employer hostility and discrimination?
>
> (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
>
> (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
>
> (4) Place and method of interrogation, e.g., was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
>
> (5) Truthfulness of the reply.

[9] Of course, whether or not the questioned employee was actually intimidated is irrelevant. “It is well settled that the basic test for evaluating whether there has been a violation of Section 8(a)(1) is an objective test, i.e., whether the conduct in question would reasonably have a tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and not a subjective test having to do with whether the employee in question *was actually intimidated*.” *Multi-Aid Services*, 331 NLRB 1226, 1227–1228 (2000), enf’d. 255 F.3d 363 (7th Cir. 2001) (Board’s emphasis). Accord, *Miller Electric Pump*, 334 NLRB 824, 825 (2001); *Joy Recovery Technology Corp.*, 320 NLRB 356, 356 (1995), enf’d. 134 F.3d 1307 (7th Cir. 1998).

occurred in the course of casual "regular daily conversations" largely about other work-related matters. There may be things I do not know about, but the record is devoid of evidence of employer hostility toward unionization, union activity, or discrimination toward employees. There are several unfair labor practices alleged, and, as indicated, I will find merit to a number of them. But none involve allegations of unlawfully motivated misconduct. Neither the 8(a)(5) nor the 8(a)(1) allegations found to be a violation of the Act are instances in which employer hostility or antiunion animus forms an element of the violation as a matter of law or fact. None was demonstrated.[10] I do not think that Senyeri's questions—even his asking which employees were talking about the union at the time clock, evinced any intent that he was asking in order to take action against them. While asking whether anyone was talking about the union does amount to a question about "union activity," it is far removed from a demand to know who is engaged in union organizing or who supports the union. Finally, Franko answered Senyeri's questions truthfully, a *Bourne* factor that, under these circumstances at least, reinforces the noncoercive nature of these inquiries.

A further factor influences my view. The alleged interrogations occurred approximately three months after the October 17 representation election, at a time when collective-bargaining negotiations were commencing. The Union was certified less than two weeks after the election, indicating the absence of much if any post-election disputation. In other words, these isolated interrogations occurred well after the conflict and campaigning that is attendant to representation campaigns had subsided. Of course, I do not mean to suggest that an employer cannot coercively intimidate an employee outside of the election period, but it is relevant to assessing the coerciveness of this interrogation that it did not occur in an atmosphere or context where the fear, suspicions and uncertainty that often animate a campaign were in play. Questioning whether someone was talking about the union, or had questions about the union, does not carry the implicit threat of retaliation that it might in the middle of a hard fought organizing campaign, especially one involving employer actions against union supporters. See, *Southern Pride Catfish*, 331 NLRB 618, 622–623 (2000) (finding interrogation unlawful, relying in part on fact that "[t]he inquiries took place shortly before a Board election while Respondent was systematically attempting to ascertain its employees' union sympathies and threatening them"). Most of the case law regarding interrogation arises in the context of organizing campaigns. This is undoubtedly when most interrogation occurs, but it is also a context that heightens the coercive tendency of the inquiry. That is absent here.

Finally, I note that the only case the General Counsel cites in support of these specific allegations is a default judgment case, which is necessarily without precedential value, in which the Board summarily adopted an allegation that an employer's representative unlawfully interrogated employees about other employees' union activities. (See, GC Br. at 44, citing *Casworth Enterprises, Inc.*, 362 NLRB No. 131 (2015)). While I agree that it *may* be unlawful to interrogate employees about other employees' union activity, I am unaware of any case that would render the conduct engaged in here, in its full context, unlawful.

[10] As discussed below, the Respondent evinced a somewhat cavalier indifference to its obligation to respond to the Union's information request but that was not an issue of hostility or discrimination. Similarly, while I find that the Respondent unlawfully refused to bargain with employee Jerry Davis on the negotiating team, there was no general refusal to bargain or anti-union hostility or discrimination involved in this dispute. The dispute over the duty to bargain over the use of Drive-Cam is a dispute over the scope of the statutory duty to bargain, not an issue of employer hostility to unionization. Finally, I have found that the Employer maintained unlawfully broad rules on solicitation and application, but there is no evidence that these rules were applied against employees or a product of antiunion hostility.

Under all the circumstances, I do not find a violation of the Act.[11]

B. 8(a)(5) and (1) issues[12]

1. The duty to bargain over the effects of the implementation of Drive-Cam

Drive-Cam is the name of an audio and visual recording device that Ready Mix purchased and installed in its trucks in an effort to document and deter unsafe driving events and practices. According to the device's "overview" brochure (entered into evidence), the Drive-Cam device entails multiple cameras installed in the driver's cabin. Based on parameters set by the customer (i.e., here, the employer), the device records "events" such as collisions or erratic driving. According to the brochure, the device is useful for documenting seat belt infractions, cornering too fast, following distance, braking issues, food or drink issues, and failure to scan the intersection. The recording is downloaded and available to the employer to review. It can be used as a basis of discipline, but can also be a basis for exonerating the employee if the recording demonstrates, in an accident, for instance, that the fault lies with another vehicle.

According to the testimony of HR Manager O'Reilly, the decision to implement Drive-Cam was made by the company nationally in 2012 or 2013. The program began to be unveiled regionally in 2014. The schedule called for installation of the cameras in the trucks for the northern Alabama facilities in August 2014, with installation at Huntsville scheduled for and occurring at the end of August 2014. Managers and employees were also trained on the system at this time. By the end of August, nearly all the Huntsville employees had signed releases relating to Drive-Cam, which acknowledged that Drive-Cam would be in the truck they were driving and "which may continuously monitor and capture my driving and behavior" and acknowledged that "in the course of driving a CEMEX vehicle, I am being videotaped, photographed, or otherwise recorded." The releases stated that the signing employee released all rights to the recordings and granted CEMEX authorization to use them for any purpose.

One of the purposes of implementing Drive-Cam was to use it as a coaching and disciplinary tool against employees. When an "event" triggers Drive-Cam, the event becomes the basis for "counseling" and "coaching" of the employee. These counseling sessions were temporarily halted, however, while Ready Mix waits to "see how this [unfair labor practice proceeding] is sorted out."

Notwithstanding the introduction of the Drive-Cam device into trucks in late August, during the balance of the year they were not used by Ready Mix to discipline, coach, or otherwise used with employees. The camera and recording devices were functioning through the fall, recording

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[11]Given my conclusion, I need not reach the Respondent's contention that Franko was not a statutory employee but rather, a statutory supervisor under the Act. I note only that, as argued by the General Counsel, on this issue it is well settled that the party asserting an individual's supervisory status—in this case, the Respondent—bears the burden of proof. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711–712 (2001) (approving Board's rule that burden of proving supervisory status is borne by party claiming that an employee is a supervisor); *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006).

[12]I note that each 8(a)(5) violation is also alleged as, and if found is also a derivative violation of Sec. 8(a)(1) of the Act. *Tennessee Coach Co.*, 115 NLRB 677, 679 (1956), enf'd. 237 F.2d 907 (6th Cir. 1956). See *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

incidents that met the designated parameters, but the recordings were kept to management and not shared or discussed with—or used against—employees.

The Union was not contacted by Ready Mix and alerted to or told about the Drive-Cam system until the morning of January 20, 2015, when O'Reilly sent an email to the Union's Secretary-Treasurer Gronek, informing him:

> I wanted you to be aware that we are implementing Drive-Cam at the Huntsville plant. The cameras that have been in the trucks for several months will be going "live" this Thursday January 22, 2015. Although the Company does not have an obligation under the National Labor Relations Act to inform you of this preplanned change—I wanted you to be aware as a courtesy. This has been an ongoing Company wide effort, which started early in 2014, well before a petition was filed in Huntsville I know you mentioned that you have worked with transportation companies in the past, so you may already be aware of what Drive-Cam is. If not, here is a brief overview: The Company uses Drive Cams to protect the Company and the employees from liability claims and to maximize the safe delivery of its products and services to customers and the general public through training, coaching and counseling of its drivers. We will be giving an overview of the process and I have asked for Jerry Davis [the Huntsville employee-union representative] to be included so he understands the process.

Gronek testified that this was the first he had heard anything about Drive Cam in relation to the Huntsville bargaining unit. Gronek responded later that same day January 20, 2015, disputing the essentials of O'Reilly's email. His letter included the following:

> I am in receipt of your correspondence today concerning Drive-Cam.
>
> The Union does not agree that it is ok to implement the cameras and have them go live, without first meeting to bargain on this subject. Accordingly, I hereby demand to bargain concerning your implementation of the Drive-Cams and their effects on the terms and conditions of employment of the drivers we rep[resent]. Please contact me immediately to set a meeting for this purpose. . . .
>
> We remind you that any and all changes in . . . the terms and conditions of employment, as well as discipline of bargaining unit employees, subject to your duty to bargain with Local 402 as exclusive representative[.] We look forward to hearing from you on all subjects encompassed in such duty, and will be available and stand willing to meet with you for those purposes.

O'Reilly responded to Gronek's letter in an in an email dated January 26, 2015. In it, O'Reilly disputed Gronek's claims about Ready Mix's duty to bargain and invited Gronek to sit in on upcoming "coaching/counseling" of drivers. O'Reilly wrote:

> After voluntarily notifying Teamsters Local 402 that Ready Mix US was implementing its long-intended plan to turn on the Drive Cams in its vehicles, you replied and suggested that the Company is obligated to bargain about this issue.
>
> The Company had plans to put Drive Cams in its vehicles long before it was informed of the organizing drive by the Teamsters. Our drivers were well aware of the plan and, in fact, have signed acknowledgements that the plan would be

> implemented. Our notice to the Teamsters was not required by law, but was provided to the Local as a courtesy.
>
> In light of the history planning to put the Drive Cams in place (which was done some time ago), it would have been improper for the Company not to have turned the system on. The Company is confident that it was not obligated to bargain about this subject before acting on its plan. It was within its management rights to activate this system.
>
> If you have any further questions on this, we can discuss them when we meet on February 25.[13]
>
> Also, we plan to begin coaching/counseling drivers with Drive Cam issues this week. Do you wish to start sitting in on this? If so, I will have the plant manager start to coordinate with you when we have a coaching /counseling session.
>
> Sorry for the delayed response—I was traveling last week.

Gronek responded January 30, and asked O'Reilly for "the schedule of counseling/ coaching sessions so I could attend if my schedule permits." O'Reilly did not respond on this issue. At trial he testified that facility union representative Davis had been invited to the initial counseling/coaching sessions "while we were rolling it out" but that at some point Ready Mix had ceased the counseling sessions and was waiting to see the results of the unfair labor practice litigation. There is no evidence as to whether or not Davis attended or was included in any overview of the process or any initial disciplinary sessions.

With regard to bargaining over Drive-Cam, Gronek testified that

> The Company initially said we don't have to talk to the Union about Drive-Cam. Then in subsequent negotiating sessions, the Company agreed to negotiate in regards to any impending discipline that arise from the information collected from Drive-Cam. So there have been numerous discussions.

Analysis

The complaint alleges that on or about January 20, 2015, the Respondent announced the implementation of its Drive-Cam system effective January 22, without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to the effects of this implementation on employees. The complaint alleges this is violation of Section 8(a)(5) of the Act.

Notably, consistent with the complaint, on brief, the General Counsel does not allege a duty to bargain over the decision to implement the Drive-Cam system—only over the effects of its implementation on employees, most notably, the effects of using the system for discipline against employees.

[13] As discussed below, the parties originally agreed to meet February 24 and 25, but ultimately cancelled the February 25 meeting to avoid bad weather.

The General Counsel is on solid ground here. The statutory duty to bargain "includes a duty to bargain about the effects on employees" even "of a . . . . decision that is not itself subject to the bargaining obligation." See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679–682 (1981); *NLRB v. Litton Financial Printing Division*, 893 F.2d 1128, 1133–1134 (9th Cir. 1990), revd. in part on other grounds 501 U.S. 190 (1991). As the Board explained in *The Fresno Bee*, 339 NLRB 1214, 1214 (2003):

> Where changes in employee working conditions constitute such a bargainable effect, an employer violates Section 8(a)(5) and (1) of the Act by implementing those changes without bargaining with the union. See *Litton*, 893 F.2d at 1133–1134. *Holly Farms Corp. v. NLRB*, 48 F.3d 1360, 1368 (4th Cir. 1995), cert. granted on other grounds 516 U.S. 963 (1995), affd. 517 U.S. 392 (1996) (some citations omitted).
>
> An employer violates Section 8(a)(5) when it makes a material and substantial change in wages, hours, or any other term of employment that is a mandatory subject of bargaining, at a time when the employees are represented by a union, and in the absence of an impasse in bargaining. Even where a change resulted directly from a permissible, preelection or managerial decision concerning the scope of the business, the employer is required to bargain over the change as an effect of that decision. *First National Maintenance Corp. v. NLRB*, 452 U.S. at 677 fn. 15; *Bridon Cordage*, 329 NLRB 258, 259 (1999); *Litton Financial Printing*, 286 NLRB 817, 819–821 (1987), enfd. in relevant part 893 F.2d 1128 (9th Cir. 1990), cert. denied in relevant part 498 U.S. 966 (1990). This is so because in most such situations "[t]here are alternatives that an employer and a union can explore to avoid or reduce the scope of the [change at issue] without calling into question the employer's underlying decision." *Bridon Cordage*, supra.

339 NLRB at 1214 [Board's bracketing].

Moreover, the duty to bargain over the effects of a decision that is nonbargainable is not limited to after-the-fact discussion. See *Berklee College of Music*, 362 NLRB No. 178, slip op. at 2 fn. 2 (2015) ("The Board's general rule is that effects bargaining must occur before implementation for bargaining to be meaningful"); *Kajima Engineering & Construction*, 331 NLRB 1604, 1620 (2000) (as with decisional bargaining, effects bargaining requires an employer to provide the union with prior notice of bargainable issues before they occur); *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021, 1021 fn. 8 (1994). See *Oklahoma Fixture*, 314 NLRB 958, 961 fn. 7 (1994) (once employer has decided to implement a change in terms of employment, time is ripe for effects bargaining), aff'd in relevant part, 79 F.3d 1030 (10th Cir. 1996).

Thus, the Respondent had a statutory obligation, which it ignored, to provide the Union notice and an opportunity to bargain over the *effects* of its decision to implement Drive-Cam before it went "live" with the cameras and began accumulating footage for use in disciplinary events.

In this case, while the decision to implement Drive-Cam is not at issue, the implementation of this new technology—at least once the Respondent went "live" with Drive-Cam and began disciplining and/or counseling employees based on "events" recorded by Drive-Cam—had a direct effect on the terms and working conditions of employees. The penalties for incidents based on Drive-Cam events, the methods of challenging the Drive-Cam-based discipline, and its very use as part of disciplinary counseling and discipline are all effects of the implementation of Drive-Cam, and as such, are mandatory subjects of bargaining. Obviously, employee discipline

is a core term and condition of employment, and Drive-Cam's use as a disciplinary tool is a bargainable subject. And, just as obviously, the use of Drive-Cam to abet the disciplining and counseling employees could be carried out in an infinite number of ways—in other words, this is not a case where the disciplinary use to which the Employer puts Drive-Cam is an "inevitable consequence" of its implementation. Accordingly, the disciplinary issues are bargainable. *The Fresno Bee*, supra at 1215.

In this regard, I reject the Respondent's argument that, because the Employer already disciplined employees for unsafe driving, the use of Drive-Cam to abet discipline "does not constitute a change in working conditions." It does. And it does, in precisely the same way and for the same reasons that the Board and courts have repeatedly held that an employer's adoption of surveillance cameras to view employees at work is a change in working conditions.

Thus, in *Colgate-Palmolive Co.*, 323 NLRB 515 (1997), the Board found that the installation of hidden surveillance cameras in the work place was a mandatory subject of bargaining based on the Supreme Court's description in *Ford Motor Co. v. NLRB*, 441 U.S. 488, 489 (1979), of "mandatory subjects of bargaining as such matters that are 'plainly germane to the 'working environment'" and "not among those 'managerial decisions, which lie at the core of entrepreneurial control.'" (quoting *Fibreboard Corp. v. NLRB*, 379 U.S., 203, 222–223 (1964) (Stewart J., concurring). The Board determined in *Colgate-Palmolive* that surveillance cameras are "germane to the working environment" and "analogous to physical examinations, drug/alcohol testing requirements, and polygraph testing, all of which the Board has found to be mandatory subjects of bargaining. They are all investigatory tools or methods used by an employer to ascertain whether any of its employees has engaged in misconduct." 323 NLRB at 515. The Board held that such changes in employer methods have "serious implications for its employees' job security." Id. at 515–516. At the same time, the Board found that the use of such devices by an employer "is not entrepreneurial in character, is not fundamental to the basic direction of the enterprise, and impinges directly upon employment security . . . [but] in no way touches on the discretionary 'core of entrepreneurial control.'" Id. Accordingly, the Board held that the installation of surveillance cameras constitute a change in working conditions and are a mandatory subject of bargaining. Id.; *Anheuser-Busch*, 342 NLRB 560 (2004), enf'd. in relevant part, 414 F.3d 36 (D.C. Cir. 2005); *Genesee Family Restaurant*, 322 NLRB 219, 225 (1996) (finding 8(a)(5) violation: "There is no question about the significance to employee working conditions of the mid-November installation of video cameras to monitor employee conduct in their workplace; in fact, Respondent uses a tape from the videos to buttress its disciplinary action against an employee who is discharged"), enf'd. mem. 129 F.3d 1264 (6th Cir. 1997); *Nortech Waste*, 336 NLRB 554, 568 (2001) ("no doubt" that unilateral installation of cameras in work areas violated 8(a)(5)). Accord, *National Steel Corp. v. NLRB*, 324 F.3d 928 (7th Cir. 2003) (accepting as "conclusive" the Board's view that surveillance cameras in the workplace are a mandatory subject of bargaining).

Here, the effects of the Respondent's Drive-Cam implementation are equally "germane to the working conditions"—in precisely the same way as continuous surveillance cameras: it affects the disciplinary prospects of employees on the trucks, who now may find a series of incidents recorded while they are at work in company vehicles that will be used in meting out discipline and potentially affect their future employment.

Respondent's protestations that continuous surveillance cameras are not the same as Drive-Cam cameras—openly installed in trucks and set by the Respondent to record only "triggering" incidents (accidents, sharp, turns, sudden accelerations, etc.)—argues a distinction without significance. At bottom, Drive-Cam is focused on employee behavior and conduct. It views and records when triggered to do so based upon parameters set by the employer. Thus,

the presence of the Drive-Cam cameras creates new circumstances, in the discretion of the employer, under which employees' actions may result in discipline, or, to the same point, avoid discipline if an accident is revealed to have been someone else's fault. Just like a surveillance camera, it is used as an "investigatory tool[ ] or method[ ] . . . to ascertain whether any of its employees have engaged in misconduct." *Colgate-Palmolive*, supra at 515. At the same time, it "is not entrepreneurial in character, is not fundamental to the basic direction of the enterprise." Id. The use of Drive-Cam causes a change in terms and condition of employment, and the effect of it on the terms and conditions of employment—such as discipline—is a mandatory subject of bargaining.

As noted above, the Government is not contending that Ready-Mix was required to provide the Union an opportunity to bargain over the *decision* to implement Drive-Cam. But Drive-Cam is a mandatory subject of bargaining, and the effects of its implementation on employee discipline is a subject on which the Respondent was required to provide notice and an opportunity to bargain.[14]

Finally, I note that the Respondent argues (R. Br. at 25) that Gronek "admitted" that the Respondent "has offered to negotiate regarding any such discipline." It bases this contention on Gronek's testimony that, after contending that "we don't have to talk to the Union about Drive-Cam, [t]hen in subsequent negotiating sessions, the Company agreed to negotiate in regards to any impending discipline that arise[s] from the information collected from Drive-Cam." (Tr. 177).

This is inadequate. In the first place the duty to bargain is broader than a duty to bargain only over "impending discipline." The Union is entitled to a meaningful opportunity to bargain over the disciplinary rules to be applied to Drive-Cam incidents as well as over Drive-Cam's use in the disciplinary system. As referenced above, the duty to bargain over the effects of Drive-Cam's implementation is not limited to after-the-fact discussion of already imposed discipline or after-the fact discussion of how Drive-Cam should be used in the disciplinary system. See *Berklee College of Music*, supra, at 2 fn. 2; *Kajima Engineering & Construction*, supra at 1620; *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB at 1021 fn. 8; *Oklahoma Fixture Co.*, 314 NLRB at 961 fn. 7 (1994).

But equally to the point, an employer cannot satisfy its statutory duty to bargain by expressing a willingness to discuss a bargainable subject *while maintaining* that it has no duty to bargain. This amounts to a pallid offer of ersatz bargaining in which the employer suffers the union's demand for discussion but reserves the right to stop talking whenever it chooses. If the statutory duty to bargain is in effect, this approach is unlawful. *San Diego Cabinets*, 183 NLRB 1014, 1020 (1970) (rejecting employer's contention that because it informed union of its willingness to meet and discuss matters it had not refused to bargain, where employer consistently maintained that it had no duty to bargain: "its professed willingness to discuss this unlawful position does not excuse the violation"), enf'd. 453 F.2d 215 (9th Cir. 1971). See, *Mi Pueblo Foods*, 360 NLRB No. 116, slip op. at 10, 17 (2014) (effects bargaining violation for employer to state that while it had no duty to bargain it was willing to "discuss" a process for implementing layoffs).

[14]And it is not, as the Respondent seems to think, sufficient or even ameliorating, for it to provide the Union an opportunity to be present at disciplinary events arising out of Drive-Cam-recorded events. See, R. Br.at 25 ("In addition, Respondent has always sought to include the Union in any coaching or discipline arising out of any unsafe driving practices recorded by Drive-Cam").

This is what the Respondent did here, after implementation of Drive-Cam. No matter what discussions regarding Drive-Cam and discipline in which it ultimately engaged, the Employer announced and began the use of Drive-Cam for disciplinary purposes without notice and without accepting an obligation to bargain over the effects of the Drive-Cam decision, even in the face of Union demands that it do so. This is a violation of Section 8(a)(5) of the Act, as alleged.

2. The Union's information request concerning Drive Cam

As discussed above, on January 20, 2015, O'Reilly notified Gronek about the implementation of Drive-Cam. Gronek's same-day response included a request for information regarding Drive-Cam. In reference to a requested meeting to bargain over Drive-Cam, Gronek's letter stated:

> In connection with such meeting, please provide us with the following information:
>
> 1 The identity of the manufacturer;
> 2 The cost of the implementation;
> 3 The method of documentation of the images retrieved by the cameras;
> 4 When how and if the videos will be reviewed;
> 5 Whether the cameras will be used for disciplinary purposes; and
> 6 Any instruction or operation manuals for use with the cameras.
> 7 Is Huntsville the only location?
>
> Thank you in advance for your prompt response.

As discussed above, O'Reilly responded to Gronek in an email dated January 26, 2015. The response did not contain any of the requested information. The letter did not mention the information request contained in Gronek's letter, but stated that if there were "further questions on this, we can discuss them when we meet [for collective bargaining] on February 25."

In his testimony, O'Reilly discussed, albeit in vague terms, often responding with non sequiturs, three ways in which he claimed that Ready Mix provided the Union with the information contained in the January 20 information request. These three ways were through email, through phone conversations, and through discussions at the bargaining table.[15]

The vagueness and non sequiturs did not, to my mind, reflect dissembling, and not so much a lack of recollection, but the fact, as quickly became evident from O'Reilly's testimony, that there was never any purposeful, distinct, dedicated, much less comprehensive response made by the Respondent to the Union's information request. Rather, the information request was largely ignored and to the extent information was supplied, it trickled out, provided incidental to interactions between the parties that occurred over the course of many months.

Thus, with regard to a question (on direct examination) as to which items of the information request he discussed with the Union Representative Gronek by phone, O'Reilly stated that "to the best of my knowledge, we touched on each of them by phone in some way." Then, asked by his counsel how he "touched by phone" regarding the identity of the manufacturer

[15]O'Reilly's testimony concerned items 1, and 3–7 of the Union's information request, as do my references to the information request throughout the remainder of this decision. This is because the General Counsel alleges a violation with regard to the Employer's response to those requests, but not to the Employer's response to item 2.

(item #1), O'Reilly responded: "Again, I think part of the conversation was that this is a CEMEX-wide system. I remember part of the conversation being about this is exactly the same thing we're using in California, where we have Teamster contracts." Regarding the method of documentation of the images retrieved by the Drive-Cam cameras (item #3), O'Reilly answered, "A similar thing, what—how we would be reviewing the images record. Again, I think I referenced back to we're using this in California in the Teamsters contracts." Asked what was discussed by phone regarding how and if the videos reviewed, O'Reilly answered "Same lines, it was a discussion about how they would be reviewed and that they're being used in other parts of the country, specifically that the Teamsters have [it] already in a contract with CEMEX."

This went on in similar fashion—with heavy reliance by O'Reilly on the assertion that CEMEX was using Drive-Cam with a group of Teamsters employees in California. In summary, O'Reilly asserted that these issues have been "off-and-on conversations" with Gronek "since approximately I sent that e-mail of that notice."

O'Reilly then answered a series of questions about the Employer's furnishing of the requested information at negotiating sessions. Asked if he provided information regarding the identity of the manufacturer during the February 24 bargaining session, O'Reilly stated "We talked about, again, you know, to put context—the answer is yes, but to put context to it, at these sessions we had the International rep, Mr. Helfer [who was from California], there, so yeah, we talked about it. Again it's the same system we're using in California, so yes, we talked about it." Asked if he provided information on the method of documentation of the images retrieved by the cameras during the February bargaining session, O'Reilly answered, "Again, yes . . . . we talked about how the images are stored on the camera, what they're used for, and again we referenced back to we're using this in California, and Stu [Helfer] was there, and we talked about it a little bit more." Asked if he provided information during the February bargaining session on when and how and if the videos will be reviewed, O'Reilly stated "We discussed just that, how the videos were going to be reviewed. At this sessions, what sticks out the most is that we talked about I, and at that time Jerry Davis was still the representative of the Union, and Mr. Davis made the statement to everyone in the room that what a great tool this is, that he has seen it in action, he supports it, so I mean, I know that was talked about." Asked if, during the February bargaining session, the parties discussed whether the cameras would be used for disciplinary purposes, O'Reilly answered "In some degree, yes. . . . Just how it could be applied, because the question came up as far as what would happen. Again, there was some discussion about the fact we had this in California. And I keep referencing California because their representative there was from California, so he was familiar with the system there." O'Reilly added that he told the Union "there would be—it's a coaching tool, it's a counseling tool, but also there are—there can be disciplinary discussions attendant to it."

The Employer's counsel asked O'Reilly if he provided information in the February bargaining session as to whether Huntsville was the only location that had Drive-Cam. O'Reilly responded, "Yeah. Again, I mean, we established that, you know, just because we were talking about California, you know, they had a representative from the International there. He was familiar with it." O'Reilly stated that he told the Union "something" like that this was "a nationwide initiative" by CEMEX.

O'Reilly was asked about whether the parties discussed any instruction or operation manuals during the February meeting. O'Reilly answered "Yes. We talked about that again. . . . I guess I was probably confused by the question because we got it in California, it's the same thing, it's the same system used the same way. But to be fair, they wanted more information, and they asked me if I would get some more information on the system itself."

As to the request for the Drive-Cam manual, on March 10 the Union followed up with a letter from union counsel Sam Morris to Ready Mix's counsel Silbergeld:

> During our last meeting, you pleaded with the Union to withdraw its charge on the Drive -Cam issue. You pointed out that Jerry Davis, who you have now sought to bar from our meetings, wasn't opposed to the program. We said we would consider it, but pointed out that you had implemented the program postelection without notification or bargaining.
>
> You said you would provide us with the manual for the product. We don't have it yet. Have you forgotten?

Silbergeld responded that day, stating:

> The Company is formally responding to your request for detailed information regarding the Drive-Cam system which, as you know, has been adopted at other facilities where Teamster locals represent bargaining units and the implementation of which employees at the Huntsville, Alabama acknowledged before the Company had knowledge of any union organizing activity and before the Union filed it petition.
>
> Accordingly, we again ask that the Drive-Cam charge be dismissed.

The email also provided, without further comment, a hyperlink to a "frequently-asked-questions" (FAQ) page maintained by the manufacturer of the Drive-Cam system. O'Reilly testified that he sent the link to Silbergeld to provide to the Union, in response to the Union's request during the February 24 bargaining session. The printout of this FAQ was received into evidence as Respondent's Exh. 48. It is from the webpage of the manufacturer of Drive-Cam and a variety of information on the system may be found on the FAQ page and the website generally. Moreover, Gronek testified that he assumed that the website was maintained by the manufacturer of Drive-Cam. It does not, however, contain information on how Ready Mix planned to (or was) using the Drive-Cam to review video or discipline/counsel employees.

O'Reilly was asked about whether information responsive to the items requested by the Union on January 20, was provided during the April 14 bargaining session. Again, O'Reilly answered yes on some of the items, stating vaguely that "[i]t was brought up again," and repeatedly referencing that one of the union's bargainers, Helfer, was familiar with CEMEX's California operations where Drive-Cam was already in use. O'Reilly said that he didn't think he provided any "actual information" on disciplinary uses of the cameras, adding "again, the same context," which was a shorthand reference to the fact that the system was being used in California and at least one union bargainer knew how it worked there. As to information about the instructional manual, O'Reilly said that "was probably when we brought up the [internet] link, because that's what we were hoping was going to be sufficient." O'Reilly stated that he believed it had been established at this point that this system was not unique to Huntsville. More generally, according to O'Reilly, "the Union didn't have an interest in talking about" Drive-Cam at this meeting."

On May 14, O'Reilly emailed Gronek, with Gronek's January 20 information request email attached, and stated: "Can you please let me know what information has not yet been provided? I thought I had given you most of the information you requested below already, but if I missed something will you let me know? I will then start gathering the information for our next session in

June." Gronek responded to this email the next day by asking O'Reilly to "give me a call in the office when you have a minute."

Gronek testified that as of May 14, with the exception of the link provided March 10, Ready Mix had not provided any information responsive to the request.

In the ensuing phone conversation between Gronek and O'Reilly, O'Reilly testified that "one of the things that [Gronek] said they wanted to see more of was the way in which discipline would be applied, if there was some sort of document or something we could produce, and wanted more information relevant to Drive-Cam."

In response, in the June 8 bargaining session, Ready Mix provided the Union with a 22-page power point "Overview of the Drive-Cam Program," put together by the manufacturer, as well as a disciplinary guideline for managers dated October 22, 2013, and created by CEMEX for use in its Florida region. This sheet gave a list of driving violations and suggested discipline for initial and multiple offenses.

At the June 8 meeting, O'Reilly estimated that the parties talked about Drive-Cam for about an hour. At the meeting, the Union reiterated its request for a manual covering Drive-Cam. This triggered an effort by O'Reilly to obtain a technical manual on Drive-Cam from the manufacturer. On June 11, O'Reilly asked CEMEX's safety department to attempt to obtain such a manual from the manufacturer, but according to the email correspondence entered into evidence (see R. Exh. 13) the manufacturer declared that it did not "have an actual manual that we can share." It did, however, offer to conduct a phone call with union representatives to help answer questions. On June 15, O'Reilly wrote to Gronek. He stated:

> I have spoken to our representatives from Drive Cam about getting the technical manual we discussed during negotiations. They are willing to get on a conference call to discuss and answer any questions related to the technical operation of the system.
>
> Can you please let me know when you would like me to set up this phone call?

The next day, June 16, O'Reilly wrote again to Gronek stating:

> Our account manager with Drive Cam indicated they did not have a manual they would provide. I suspect this is because a lot of the information contained is proprietary. They did indicate they would answer any specific questions about the system and its operation.
>
> That being said, is there a date/time that works best for you to schedule the call?

Gronek responded the next day, June 16:

> Thank for your offer of a "Q and A" session with the purveyors of Drive-Cam.
>
> We really feel that our request for a copy of the manual is appropriate and important, especially since you implemented the device unilaterally and at first refused to even talk about it. We would be glad to have a "Q and A" session with the manual in hand.

Please let us know.

For his part, Gronek admitted that he and O'Reilly had had numerous discussions on the phone regarding Drive-Cam, but that these predominantly regarded O'Reilly's contention to the Union that Ready Mix had no obligation to bargain with the Union before "implementing its long-intended plant to turn on the Drive Cams in its vehicles" (GC 17; Tr. 175). Gronek stated that most of the conversations involved Ready Mix asking him to "drop these [unfair labor practice] charges."

Gronek testified that "[w]e've had discussions across the table where in generalities the Company has tried to explain how Drive-Cam works. For instance, Gronek testified that in negotiations in June Ready Mix explained that

> "there's a balancing mechanism in [the Drive-Cam device], that if it sways too far one way or another, it triggers the camera, that there's a camera in the cab, that there's a camera on the front, there's a camera on the back, that . . . I think Charlie explained it at one of our sessions, that . . . [Ready Mix] . . . tells Drive-Cam what a qualifying event is. . . . I think Ron or Charlie, one of the guys said in negotiations, if we at every event got an e–mail, it would send an e–mail to the Company notifying them of anything, maybe a strong braking or something like that, that there's certain levels that trigger a qualifying event in which the Company is notified by Drive-Cam. That came through discussions and negotiations across the table [16]

Other than this, while agreeing that Drive-Cam was discussed in some manner at each bargaining session, Gronek's testimony emphasized the Employer's repeated requests that the unfair labor practice charges over Drive-Cam be dropped. Gronek agreed that there had been discussion at the table "in general terms" about "what triggers the cameras on and off." He agreed that he "assumed" from the internet FAQ link sent by Silbergeld to union counsel that Lytx was the manufacturer. He also agreed that he received the copy of the manufacturer's 22-page power point brochure on Drive-Cam, provided June 8, which contains information relevant to his information requests. He admitted, after some prompting, that "[p]robably during negotiations, discussions, it was said that you got Drive-Cam in other locations." He admitted he was given the Florida policy on use of the Drive-Cam for discipline on June 8, and he was invited at one point to disciplinary meetings, although it is unclear whether he was invited to any particular meeting that was ever held. Gronek maintained that he still did not know "if you're going to discipline, how you're going to discipline. There's all kind of questions, but the Company has refused to discuss it until recent negotiation sessions." Gronek maintained that no information had been provided regarding "when and how the videos will be reviewed." Gronek testified that with regard to the method of documentation of images retrieved by the cameras, he did not know "How long the images are catalogued, who has access to them, what triggers a qualifying event in the

[16] I note that I discredit and do not accept Gronek's mistaken testimony that he thought that Ready Mix told the Union in the April negotiating session that it could not obtain a manual from the Drive-Cam manufacturer. As the record demonstrates, O'Reilly did not seek the manual until June 11, after the Union's reiteration of its request during the June 8 meeting. It is not plausible that O'Reilly or Ready Mix would have or could have conveyed to the Union the inability to obtain the manual until sometime after June 11. I note that Gronek, who testified about events at various bargaining table without the aid of notes, stated that he could not "be totally positive" about whether the April 14 session was, as he asserted, the session in which Ready Mix said that it could not obtain the manual. I find that he was mistaken.

Company's eyes," and "who makes the determination whether or not it is a triggering event in regards to Drive-Cam."

Analysis

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with information about Drive-Cam requested in Gronek's January 20, 2015 email to O'Reilly.

"An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration." *A-1 Door & Building Solutions*, 356 NLRB No. 76, slip op. at 2 (2011); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *Pulaski Construction Co.*, 345 NLRB 931, 935 (2005). "Generally, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. By contrast, information concerning extra-unit employees is not presumptively relevant; rather, relevance must be shown." *A-1 Door & Building Solutions*, supra, slip op. at 2 (citations omitted).

Contrary to the position of the Respondent, I have found, as discussed above, that Drive-Cam constitutes a term and condition of employment for unit employees and a mandatory subject of bargaining (notwithstanding that, due to the timing of the decision to implement, there was no duty to bargain over that). As such, requests for information concerning it are presumptively relevant. The Union need not show or prove its need for the information. *National Steel Corp.*, 335 NLRB 747, 747–748, 752 (2001) (union's request for "all information" concerning surveillance cameras was presumptively relevant: "It follows from the Board's conclusion in *Colgate-Palmolive*, that . . . information regarding these cameras is relevant to the Union's discharge of its statutory duties"), enf'd. 324 F.3d 928 (7th Cir. 2003); *Tenneco Automotive Inc.*, 357 NLRB No. 84 (2011) (information about decision to install surveillance cameras presumptively relevant), enf'd. in relevant part, 716 F.3d 640 (D.C. Cir. 2013).

"The duty to furnish information requires a reasonable good-faith effort to respond to the request as soon circumstances allow." *Monmouth Care Center*, 354 NLRB 11, 52 (2009), reaffirmed, 356 NLRB No. 29 (2010); *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993) ("[I]t is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow"). "In evaluating the promptness of the employer's response, 'the Board will consider the complexity and extent of information sought, its availability, and the difficulty in retrieving the information.'" *West Penn Power Co.*, 339 NLRB 585, 587 (2003) (quoting *Samaritan Medical Center*, 319 NLRB 392, 398 (1995)), enf'd. in relevant part 394 F.3d 233 (4th Cir. 2005). Like a flat refusal to bargain, "[t]he refusal of an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a per se violation of the Act." *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975); *Procter & Gamble Mfg. Co.*, 237 NLRB 747, 751 (1978), enf'd. 603 F.2d 1310 (8th Cir. 1979).

"An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). "Absent evidence justifying an employer's delay in furnishing a union with relevant information, such a delay will constitute a violation of Section 8(a)(5) inasmuch 'as the Union was entitled to the information at the time it made its initial request, [and] it was Respondent's duty to furnish it as promptly as possible.'" *Woodland Clinic*, 331 NLRB 735, 737 (2000) (Board's brackets), quoting, *Pennco, Inc.*, 212 NLRB 677, 678 (1974).

Here, on January 20, 2015, the Union requested information concerning Drive-Cam—who makes it, how it works, where is it utilized by the Respondent, and how will it be used in relationship to discipline. The requests were basic, and for the most part simple to answer in some reasonable fashion. Moreover, with the exception of the manual, the information was readily available to or obtainable by the Respondent.[17]

However, the Respondent made no effort at all to provide the information in advance of the first negotiating session, which was over one month away. Indeed, O'Reilly's response to Gronek on January 26, did not even mention the information request. While over time, in some cases many months, most of this basic information was eventually conveyed, at no time did the Respondent ever provide a coherent response to the Union's initial information request. As reference above, to the extent information was supplied, it trickled out, provided incidental to conversations between the parties that occurred over the course of many months. As was evident from O'Reilly's testimony, notwithstanding a dedicated effort to lead him into it, he could not say with credible specificity if, when, or what he provided to the Union.[18]

Another tactic of the Respondent, involved reference to the assertion that Drive-Cam had been adopted at other facilities where Teamsters represented employees. Silbergeld mentioned this in his March 10 letter to union counsel. O'Reilly repeatedly referenced it in his testimony, remarking over and over, in remarkably nonresponsive fashion, that one of the union negotiators, Helfer, had experience with Drive-Cam from Teamsters he represented in California. O'Reilly retreated to this response often when seeking to respond to questions about what information was provided to the Union. The suggestion is that the Union could obtain whatever information it wanted from Helfer or the Teamsters California affiliates. However, it is well-settled that "the Union's ability to obtain the requested information elsewhere does not excuse the Respondent's obligation to provide the information." *Piedmont Gardens*, 362 NLRB No. 139, slip op. at 6 (2015); *Finley Hospital*, 362 NLRB No. 102, slip op. at 25–26 (2015); *Kroger Co.*, 226 NLRB 512, 513 (1976) ("The union is entitled to an accurate and authoritative statement of facts which only the employer is in a position to make"). In any event, several of the requests were specific to the use that this Employer intended for Drive-Cam at Huntsville.

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[17]For convenience, I repeat the requested items which are alleged as part of the unfair labor practice case:

1. The identity of the manufacturer;
3. The method of documentation of the images retrieved by the cameras;
4. When how and if the videos will be reviewed;
5 Whether the cameras will be used for disciplinary purposes; and
6 Any instruction or operation manuals for use with the cameras.
7 Is Huntsville the only location?

[18]O'Reilly's conclusory testimony about any information he claims he provided—except where buttressed by documentary evidence—is not credited. It is not creditable because it is the product of leading questioning and, independently, the conclusory tenor of the testimony indicated to me that O'Reilly has no idea if or when he provided the requested information. It was not reliable testimony on these issues. See, *G4S Regulated Security Solutions*, 362 NLRB No. 134, slip op. at 2 (2015) (refusing to rely on "testimony [that] consists chiefly of conclusory responses to leading questions by counsel"); *Hedison Manufacturing Co.*, 249 NLRB 791, 811 (1980) (discrediting testimony as vague, conclusory, and unsupported by fact), enf'd. 643 F.2d 32 (1st Cir. 1981). I credit Gronek's testimony on these issues.

All in all, the Respondent's "response" to the Union's information request was wholly inadequate to satisfy the Respondent's statutory duty to provide information. That duty requires "a good-faith effort to respond to the request as circumstances allow." Here, there appeared to be no specific effort to respond. Rather, the information request was ignored, or met with piecemeal responses over time, incidental to conversations that took place in bargaining and in other exchanges. Written documentation arguably responsive to some of the information requests was not provided until March and sometimes June, months after the request was made. Given the basic nature of the requests, the Respondent has clearly violated its statutory duty to "respond to the request as promptly as circumstances allow." *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993).

More difficult is discerning, as a factual matter, when and what information the Respondent did provide. In very large part, the difficulty is attributable to the Employer's indifferent attitude to the information request. Information that was provided was provided incidentally, without record, and entirely piecemeal, and vaguely recalled. The Respondent is not being held to a difficult standard here—a rudimentary but adequate response to the union's questions could have been made within days, and there would be no violation. At that point if the Union sought further information it would have been incumbent upon it to follow up. But, as discussed, the Respondent essentially ignored the information request for many months. However, because some information was provided—in dribs and drabs over time—it makes it difficult to determine if or when a particular request was satisfied. Nevertheless, union witness Gronek agreed that information responsive to some of the information requests was, eventually, furnished.

More specifically, with regard to item 1, (the identity of the manufacturer), this appears to have been provided for the first time on March 10, when Silbergeld sent union counsel an internet link to an FAQ page maintained by the manufacturer of the Drive-Cam system. Gronek gleaned or "assumed" from this the identity of the manufacturer. Although I do not condone this method of responding to information requests, I find that Gronek's assumption was reasonable, and I find that item 1 of the Union's information request was satisfied March 10.

Item 3 requests information on the "method of documentation of the images retrieved by cameras." I confess to not understanding exactly what this means.[19] Gronek testified that with regard to this request, he had never received information regarding "[h]ow long the images are catalogued, who has access to them" and other issues pertinent to a request that seems to go to the security and maintenance of images captured by Drive-Cam. He did receive, on June 8, the 22-page power point "overview" of Drive-Cam, which the General Counsel admits on brief (GC Br. at 24) constitutes a partial response to this inquiry. In addition, the FAQ provided March 10 contains some information indicating that the Drive-Cam company maintains the photos (and other triggering event information) online for a specified period of time. Given the vagueness of this request, I believe that the June 8 power point along with the March 10 FAQ qualifies, as responsive, and I find that if it was unsatisfactory, the Union should have stated so. By all evidence, it did not, therefore I find that that the Respondent satisfied its obligation as to this request on June 8.

[19]The Respondent did not evince any lack of understanding of this request. In any event, the appropriate and required response to an ambiguous information request is not to ignore it but to ask for clarification. *Mission Foods*, 345 NLRB 788, 789 (2005) (employer cannot simply refuse to comply with an ambiguous or overbroad information request, but must request clarification and comply with the relevant portions); *Keauhou Beach Hotel*, 298 NLRB 702 (1990).

Item 4 requests information about "[w]hen how and if the videos will be reviewed." Gronek maintained that this was never provided. I see no evidence in the record that it was. The FAQ and power point suggest some of the capabilities for review, but the Respondent's plans for review are its own. I credit Gronek's statement that this was not provided. Again, I recognize that there is a vagueness to this request. To my mind, any good faith effort on the Respondent's part to answer this question would have been satisfactory given the breadth of the question. But there is none on the record.

Item 5 asks "Whether the cameras will be used for disciplinary purposes." While Gronek maintained that he still has many questions on the details of the Respondent's discipline plans, the basic question presented by the pleadings was answered. Indeed, the initial January 20 announcement regarding Drive-Cam states that the Respondent intends "to begin coaching/ counseling drivers with Drive Cam issues" (which, as demonstrated by an employee disciplinary form put in evidence, is part of the disciplinary procedure at CEMEX facilities (R. Exh. 45)). In addition, in an exception to his largely conclusory testimony, O'Reilly testified that at the February 24 bargaining session he told the Union, with regard to Drive-Cam, ""there would be—it's a coaching tool, it's a counseling tool, but also there are—there can be disciplinary discussions attendant to it." It seems plausible that it would have been discussed February 24, as O'Reilly's initial announcement mentioned it. I find that the Employer told the Union that the cameras would be used for disciplinary purposes beginning January 20 (even before the request).

Item #6 seeks "[a]ny instruction or operation manuals for use with the camera." As to this item, the record shows that after many months, and a follow-up inquiry by the Union, the Respondent initiated a search for a manual but could not obtain a copy. It conveyed this to the Union on June 16. There is no obligation to provide what you do not have. This information request was satisfied on June 16.

Finally, item #7 asks, "Is Huntsville the only location?" Gronek admitted that "[p]robably during negotiations, discussions, it was said that you got Drive-Cam in other locations." O'Reilly's testimony constantly returned to his claim that he told the Union that this was the same system that CEMEX was using in California with other Teamster locals, in (undated) phone calls and in the February 24 meeting. This answer was deployed nonresponsively when he was asked if he provided responses to the various items on the information request. However it is not nonresponsive as to Item #7. Although it is not a thorough or particularly informative response, the question itself is a limited one. I think it more likely than not that Respondent informed the Union that Huntsville was not the only location at which Drive-Cam was used on February 24.

In summary I find that item 1 was provided March 10; item 3 was provided June 8; item 4 was not provided; item 5 was provided even before the information request, in the initial January 20 email to the Union and then again at the February 24 meeting; item 6 was not available to the Union and this was conveyed June 16; and item 7 was satisfied by February 24.

As to item 4, the Respondent's failure to provide the requested information about video review is a straightforward failure to provide requested and relevant information as set forth in the complaint.

As to item 5, I dismiss this allegation. Although it is a little unusual to find that the Respondent provided information even before it was requested, a very basic answer to a very basic information request had just been provided to the Union by the Respondent, only hours before the request was made. I do not find a failure to provide requested information in these circumstances.

As to the remaining 4 items, they were (with the exception of item 6), in time, provided. The issue is whether they were timely provided. If not then then the question is whether the delay was reasonable, because, as discussed above, "[a]n unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Valley Inventory Service*, 295 NLRB at 1166; *Woodland Clinic*, 331 NLRB at 737; *Pennco, Inc.*, 212 NLRB at 678.[20]

As referenced above, the Respondent had a duty to provide the requested information as promptly as reasonably possible. It certainly did not do that with any of this information. All of this information was readily available and the requests—general as they were—were capable of being answered in some form in days (if not hours). O'Reilly responded to Gronek's January 20 email after six days, on January 26. He apologized for the delay, indicating that he had been traveling.

Had he then promptly provided the requested information—or even referenced it and explained why he could not provide it immediately—we might well have a different case. The burdens of travel might well constitute a reasonable limitation on the Respondent's ability to provide the information sooner. But I need not decide that issue because O'Reilly did not mention the information request in his January 26 response. Instead, he defended the Employer's "rights to activate" Drive-Cam and told Gronek, "If you have any further questions on this, we can discuss them when we meet on February 25."[21]

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[20]At the close of the hearing (Tr. 360-361) the General Counsel requested—"to the extent you would not consider unreasonable delay assumed within the [complaint] allegation as it's worded"—to move to amend the complaint to include allegations of unreasonable delay. The Respondent objected to this motion. I asked the parties to brief the issue. However, my review indicates that Board precedent does not require separate complaint allegations to cover these closely related violations. *Care Manor of Farmington*, 318 NLRB 330 (1995) (where complaint alleged that employer, since date of union's request, "has failed and refused to furnish . . . the information requested," employer acted unlawfully "[b]y its delay in providing some of the information and its refusal to provide the rest"); *Shaw's Supermarkets*, 339 NLRB 871 (2003). This only makes sense. The statutory duty requires a party to *timely* furnish requested relevant information. The finding that an employer unlawfully delayed furnishing requested information necessarily means that up until the time it was provided, the employer *unlawfully failed or refused to provide* the requested information. There is no difference in proof or defense. The only difference is one of remedy, and that only favors the Respondent: as part of the remedy it need not provide information that it unlawfully delayed but ultimately provided. Given the Board precedent, I deny the General Counsel's motion to amend as moot and unnecessary. I would add that the Respondent's vigorous objection to this recasting of the violation is particularly unwarranted given its indifferent response to the entire information request. Essentially its peculiar position is that its unlawful delay is a defense to its unlawful failure to furnish and demands that the matter be dropped on that basis.

[21]Contrary to the argument of the Respondent, I do not find it relevant that Gronek did not reiterate his demand for information. *Bundy Corp.*, 292 NLRB 671, 672 (1989) (no defense to untimely furnishing of information that union did not repeat request). See, *Wayne Memorial Hospital Ass'n*, 322 NLRB 100, 109 (1996) ("The fact remains that it was incumbent on the Respondent to supply the Union with the information on request, and not for the Union to make repeated requests for the same information until such time as the Respondent saw fit to comply. Clearly, the Respondent should not be allowed avoid liability for refusing to provide relevant information by shifting responsibility to the Union to renew its requests for information every so often or risk having its request considered abandoned").

The net result is, as I have found: it took the Respondent 35 days to tell the Union the identity of the Drive-Cam manufacturer and to tell the Union that Huntsville was not the only location at which Drive-Cam was to be used; and 139 days to offer any information about the images retrieved by the cameras. It took the Respondent 147 days to tell the Union that it did not have an instruction or operating manual for Drive Cam or one it could obtain. Indeed, the record shows it did not make an effort to obtain one until June 11.

Under the circumstances, these are entirely unreasonable delays. They reflect the lack of interest in and attention to the matter by the Respondent. In particular, the identity of the manufacturer and the fact that Huntsville was not the only location could have been provided within a few days. There is no basis in the record for the delay. And waiting until June to provide information about the retrieved images, and to learn that it did not have a manual, cannot legitimately be explained.

Thus, I find that the Respondent unlawfully delayed responding to the Union's information request with regard to items 1, 3, and 7.

Were I writing on a clean slate, I would also find that the Respondent unlawfully delayed telling the Union that it did not have access to an operating or instruction manual for the Drive-Cam (item 6). There is, however, a problem in this regard. Somewhat remarkably, in my estimation, in *Raley's Supermarkets & Drug Centers*, 349 NLRB 26, 28 (2007), a Board majority held that the failure to inform the union that requested information does not exist is not a violation that can be found based on a complaint allegation that generally states that the respondent has unlawfully failed to provide (or delayed in providing) requested information.

According to the Board in *Raley's*, at least where the General Counsel is on notice before trial that the respondent is claiming that the requested information does not exist, the General Counsel must amend the complaint to reflect this, or face dismissal of the complaint.

In *Raley's*, the complaint alleged that since a certain date, the employer had failed and refused to provide the union with information allegedly in an investigator's report. The Board majority, in response to the arguments of their dissenting colleague, explained that

> At no time, even after learning that such a report did not exist, did the General Counsel amend the complaint to allege that the Respondent violated the Act by failing to timely inform the Union that there were no such reports. Accordingly, we do not find a violation on that basis.
>
> Our colleague would construe the complaint to allege precisely the opposite of what it does allege. As noted above, the complaint alleges that the Respondent failed to furnish a document, viz., a copy of the investigator's report. The complaint therefore implicitly alleges that the report exists and that the Respondent refuses to furnish it. Further, we assume arguendo that the allegation can be broadly construed to cover an untimely furnishing of the report or an incomplete furnishing of the report. However, it is an unreasonable stretch to convert this allegation into its opposite, i.e., that the report does *not* exist, and that the Respondent failed to inform the Union of this fact. If the General Counsel wanted to allege this as an alternative pleading, he could have done so. He did not. We therefore decline to find a violation on this basis.

349 NLRB at 28.

The unavoidable holding of *Raley's* is that where the General Counsel learns prior to the hearing that the Respondent is taking the position that it did not possess anything responsive to an information request, the complaint must be amended to explicitly allege a refusal or delay in conveying to the Union the fact of the lack of existence of responsive information.

The situation here is essentially indistinguishable from that in *Raley's*. By June, 16, the Respondent was on record stating to the Union that it could not obtain a manual. The hearing opened a month later. Under the reasoning of *Raley's*, at least where the facts are known to the General Counsel before trial, the respondent's unlawful failure to provide, or the delay in providing the news that information does not exist must be based on a complaint allegation specifically asserting a failure to inform (or delay in informing) the union that the requested documents do not exist. See *Albertson's, Inc.*, 351 NLRB 254, 255 (2007) (reversing judge's finding of violation because "[u]nder the standard set forth in *Raley's Supermarkets*, the General Counsel must specifically allege that the failure to inform the union that the requested documents do not exist (or the delayed communication of that fact) was unlawful. The instant complaint, which does not even mention the nonexistence of the documents, plainly fails to satisfy this pleading requirement") (citation omitted)).

While I may agree that the dissent in *Raley's* has the better of the argument,[22] the reasoning of the Board's decision in *Raley's* must be followed until overruled. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) ("We emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether that precedent should be varied") (citation omitted). Here, the complaint alleges only a failure to provide information—notwithstanding the Respondent's position as of June 16 that it had no information responsive to the Union's request on item 6. Accordingly, I find no violation as to the delay in providing that information.

3. Duty to provide advance notice and opportunity to bargain over Sam Thomas discharge

Sam Thomas worked at Ready Mix since about January 2005. He was terminated October 27, 2014. His termination stemmed from an incident on October 20, discovered on October 23. Thomas' plant manager pointed out a beam and electrical box knocked off in the yard. Thomas denied having anything to do with that but admitted that when he was using a front end loader he had hit a copper pipe connected to a propane bottle that ran to a heater.

Later that day, on October 23, Thomas was asked for a statement about the incident. On October 24, Thomas was asked for a statement as to why he didn't report the incident when it

[22] In *Raley's*, the dissent explained:

> [t]he notion that an employer's failure timely to indicate that it lacks requested information is somehow distinguishable from a failure to provide available information does a disservice to the Act. The purpose of the Act's requirement that parties provide each other with relevant information is to maximize *communication* between them and so minimize industrial strife. For this purpose, it is elementary that parties must not only provide requested information, but also timely inform each other when they have none to provide. The failure to do either is obviously a violation of the duty to provide relevant information.

349 NLRB at 30 (original emphasis).

occurred. He stated that he "got busy and forgot to report it." On October 27, Thomas was discharged for the stated reason of "your failure to timely report an accident in accordance with company policies." The Union was not provided advance notice of the discharge or an opportunity to bargain over the discharge.

District Operations Manager Senyeri testified that he helped conduct the investigation of the Thomas incident with the plant manager, Daniel Kirkpatrick. Senyeri reviewed (and photographed) pictures of the damage and area of the accident attributed to Senyeri. He relied upon Kirkpatrick's representation to him that Thomas admitted he had the accident in question and that he further admitted that he did not report it. There was also the handwritten statement in which Thomas explained that he did not report the incident because he was busy and forget about it. Senyeri recommended Thomas's discharge.

In addition, Director of Human Resources O'Reilly testified that he reviewed the case and that Thomas was terminated for not reporting the accident. O'Reilly pointed to a Ready Mix "Accident Investigation" that stated that it is an employee's responsibility to "[i]mmediately report all accidents & injuries to their supervisor." O'Reilly identified a work rule—Rule 19 from the A category of offenses—that make it an offense to "[f]ail to report a vehicular accident." Thomas, like the other employees, had years earlier signed an acknowledgement that he had had received, agreed to read, and took responsibility for the personnel policies and procedures manual distributed to employees.

Analysis

The General Counsel alleges that the Respondent violated Section 8(a)(5) and (1) by discharging employee Sam Thomas on October 27, 2014, without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and its effects.

The allegation is premised on the reasoning articulated by the Board in *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012). In *Alan Ritchey*, the Board answered a question it had "never adequately addressed in its broader doctrinal context under Section 8(a)(5)":

> Whether an employer whose employees are represented by a union must bargain with the union *before* imposing discretionary discipline on a unit employee. [Board's emphasis.]

As the Board explained in *Alan Ritchey*, the issue typically arises only during the period after a union has become the employees' bargaining representative, but before the parties have agreed upon a first contract (or instituted a grievance procedure). That is, indeed, the situation in the instant case. Thomas was discharged October 27, 2014, just ten days after the representation election in which the majority of the voting bargaining unit (a unit that included Thomas) voted for union representation.

The Board in *Alan Ritchey* considered the issue of unilateral disciplinary action in the context of the general rule that once employees choose to be represented an employer may not continue to act unilaterally with respect to terms and conditions of employment. If the employer has exercised and continues to exercise discretion in regard to the unilateral change at issue, it must first bargain with the union over the discretionary aspect of the proposed change. *Alan Ritchey*, supra at slip op. 2. In a decision containing a lengthy and comprehensive treatment of the issue, the Board announced in *Alan Ritchey*:

> We hold today that, like other terms and conditions of employment, discretionary discipline is a mandatory subject of bargaining and that employers may not impose certain types of discipline [such as discharges] unilaterally.

In reaching this holding, the Board rejected further reliance on its decision in *Fresno Bee*, 337 NLRB 1161 (2001). In that case (argued amici submissions to the Board in *Alan Ritchey*), "the Board held . . . that an employer has no preimposition duty to bargain over discretionary discipline." *Alan Ritchey*, supra, slip op. at 6. In *Fresno Bee* the Board affirmed the dismissal of an 8(a)(5) allegation that was based on the imposition of discipline without bargaining.

The Board in *Alan Ritchey* explained that in *Fresno Bee*, the judge's rationale (adopted by the Board) for dismissing the allegation was that there was no evidence that the employer failed to apply its preexisting disciplinary system. Therefore, the judge concluded that the employer "made no unilateral change in terms and conditions of employment when it applied discipline." *Alan Ritchey*, supra, slip op. at 7. In *Alan Ritchey*, the Board stated that,

> [u]nder our case law, the judge's conclusion was a non sequitur. As we have explained, the lesson of well-established Board precedent is that the employer has both a duty to maintain an existing policy governing terms and conditions of employment *and* a duty to bargain over discretionary applications of that policy. [Id.]

The Board continued,

> As observed, the *Fresno Bee* Board simply adopted the judge's rationale. But that rationale—the only rationale articulated--was demonstrably incorrect. In such circumstances, we decline to follow *Fresno Bee*. See *Goya Foods of Florida*, 356 NLRB No. 184, slip op. at 3 (2011) ("We are not prepared mechanically to follow a precedent that itself ignored prior decisions, without explanation."). To the extent *Fresno Bee* contradicts our conclusion here, it is overruled.

Id. (footnote omitted).

Notably, the Board also held in *Alan Ritchey* that its holding would apply prospectively only. *Alan Ritchey, supra*, slip op. at 11. The Board explained that prior to its decision in *Fresno Bee*, "Board precedent did not speak clearly and directly to the issue—indeed it was essentially silent. . . . . To that extent, it would not have been unreasonable for the Respondent to believe that it could decline to bargain with the Union without committing an unfair labor practice." And of course, "the Board's 2002 decision in *Fresno Bee*, supra, [ ] held (incorrectly, we have concluded) that there is no pre-imposition [of discipline] duty to bargain over discretionary discipline." Id. These considerations, and the Board's understanding that this type of preimposition bargaining in the absence of a grievance-arbitration system has not been common in the workplace,

> persuade us that retroactive application of our holding could well catch many employers by surprise and, moreover, expose them to significant financial liability insofar as discharges and other disciplinary actions that could trigger a backpay award are involved.

> To be sure, we believe that today's change in the law is well-grounded in Board doctrine and better serves the policies of the Act. Retroactivity, however, is not

> essential to achieving those benefits, and it may impose unexpected burdens on employers. For these reasons, we will apply our holding only prospectively.

Alan Ritchey, supra, slip op. at 11.

The Board's decision in *Alan Ritchey* forms the basis for the instant allegation that the Respondent violated Section 8(a)(5) by failing to provide the Union notice and an opportunity to bargain before terminating Thomas. It also poses an obstacle. The panel that decided *Alan Ritchey*, it turns out, was not properly constituted. See, *NLRB v. Noel Canning*, __ U.S. __ 134 S.Ct. 2550 (2014).

The General Counsel concedes (GC Br. at 40) that in light of *Noel Canning*, supra, *Alan Ritchey* "is no longer considered binding precedent." He contends, nonetheless, that its rationale should apply because *Alan Ritchey* was "an application of longstanding Board precedent requiring employers to bargain over discretionary aspects of changes it intends to make after a bargaining representative has been selected." Id.

Of course, there is a problem with that. Even were I to proclaim agreement with the *Alan Ritchey* panel that the rationale of *Fresno Bee* was "demonstrably incorrect," it remains the case that before *Alan Ritchey* there was *Fresno Bee*, and under *Fresno Bee* and its rationale—which was adopted by the Board—the instant allegation of the complaint must be dismissed. *Alan Ritchey* overruled *Fresno Bee*, but *Alan Ritchey* is not precedent. That leaves *Fresno Bee*, wrong as it may be, in place. In any event, even were one to ignore *Fresno Bee*, as the Board made clear in *Alan Ritchey*, the general application of its principles was not so clear that the Board was willing to apply the decision in *Alan Ritchey* retroactively. That was also a part of *Alan Ritchey's* rationale, but not a part that General Counsel wants me to apply here.

Some believe that the Board will reaffirm *Alan Ritchey's* principles. It may or it may not. And if it does, it may or may not once more decline to apply the principles retroactively. I agree with the Respondent's position on this: "the Administrative Law Judge must apply Board precedent as it finds it." (R. Br. at 28). It is not my position to guess or anticipate what the Board will do in the future, but rather to apply the Board's precedents as best I can. While *Alan Ritchey* is not precedent, *Waco, Inc.*, *Inc.*, 273 NLRB 746, 749 fn. 14 (1984), is: "We emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether that precedent should be varied" (citation omitted). Accord, *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enf'd. 640 F.2d 1017 (9th Cir. 1981). I will dismiss this allegation.

4. The refusal to bargain with Jerry Davis

As referenced above, collective bargaining between the parties began January 13, 2015. The parties met in a Huntsville-area hotel.

As referenced above, present for Ready Mix was Attorney Silbergeld, Director of Human Resources O'Reilly, and District Operations Manager Senyeri. Present for the Union was Attorney Morris, Business Agent and Secretary-Treasurer Gronek, and International Representative Helfer. Also present for the Union was a Huntsville Ready-Mix employee from the newly-certified bargaining unit, employee Jerry Davis who had been the union's election observer for the October election. Davis had never before been involved in collective-bargaining negotiations. The January 13 meeting transpired without incident.

The same individuals were present at the parties' second meeting, which began the morning of February 24, around 9:30 a.m., at the same hotel. Reports of an approaching snowstorm led both union and management representatives to decide to end the meeting earlier than planned, and not to resume the next day, but, nevertheless, the parties met to bargain until early to midafternoon.

Near the end of the February 24 meeting, the union representatives arose from the table and left the room to conduct a caucus meeting.

As they left, Senyeri noticed what he thought was a pistol on Jerry Davis' right side, partially concealed by Davis's shirt and jacket. After the Union had left the room, Senyeri asked the others "anybody see that?" No one had. Senyeri said, "I'm pretty sure Jerry has a gun on his side." O'Reilly said, "I doubt it" and mentioned to Silbergeld that "it's probably his cell phone" because "there's no way somebody would bring a gun like that into this type of setting."

When the Union returned and sat down, Senyeri asked Davis "if he had a cell phone case or a pistol on his side?"[23] Davis replied "yeah, that's my sidearm." Davis then stated that he "always," carries a firearm "because there are a lot of crazies out there." There was some laughter in response and no further comments on the matter. The parties discussed getting in touch soon to plan a future meeting, exchanged pleasantries, shook hands, and the meeting ended approximately 5 minutes later, with the Ready Mix representatives leaving the room first.

Immediately after the employer representatives left, along with the other union representatives, spoke to Davis and "explained to him that it's not proper to have [a gun] in that type setting and asked him not to bring it back to any subsequent negotiations." Davis, agreed, telling the other negotiators, "that's fine, it doesn't bother me none. If somebody is upset about it, I don't have to bring it."

At the hearing evidence was introduced showing that Davis applied for and received from the State of Alabama a license to carry a concealed pistol. He has renewed this 5 year license twice, most recently in April 2014. Davis testified that his daily habit is to bring his gun "everywhere I can carry it legally."

The testimony establishes that the union representatives did not know that Davis had a gun at the meeting until it was called to their attention, when Senyeri asked Davis about it at the February 24 meeting upon the Union's return from the caucus meeting.

The next day, Attorney Silbergeld wrote to the union's attorney Morris, expressing "outrage" that Davis had brought a weapon with him into negotiations and accusing the union's representatives of "condon[ing] and "appear[ing] complicit" in a "scheme to create an environment obviously designed to put those representing the Company in fear for their lives." Silbergeld wrote that "[i]t is unthinkable that the Local, the International Representative or you as the Local's attorney would In any way abide this outrageous, intimidating conduct. . . . Other members of the Local's team, Joe Gronek, Stu Helfer, and you should be as incensed as members of our team are about this intolerable harassment and intimidation."

He continued:

[23]The testimony of witnesses was contradictory as to whether Senyeri used the term pistol, firearm, handgun, sidearm, or gun. I have used the word "pistol" in the text. It may have been one of the other terms. It's not a material difference for purposes of this case.

> We understand that carrying a licensed firearm, under certain circumstances, is permitted in the State of Alabama. It is not acceptable at the bargaining table. . . . It is simply incomprehensible, outrageous and indeed frightening that the Local allowed this to happen, then said nothing during this obvious attempt to intimidate, harass and create a fear for the safety of all those present.

Silbergeld wrote, "It will not stand." Silbergeld indicated that he had been charged by Ready Mix "to immediately determine what our options are going forward so that we can proceed free of the deep concerns and very serious risks that Mr. Davis has created. You can expect a further response within the next day or two." He concluded by stating that:

> The Company is reviewing all options regarding this most unprecedented and highly dangerous situation. All rights and claims with respect to this conduct are reserved and nothing herein, or omitted here from, shall be deemed a waiver of any of these rights or claims of the Company or the individuals to whom this conduct was directed. The Company cannot be bargaining under these circumstance[s] and cannot resume any negotiations until it may do so safely.

Union representative Gronek responded the next day by letter dated February 26. His letter began by "point[ing] out that the events you speak of in your letter did not occur until the very end of the meeting . . . . [I]f there was 'fear' and 'intimidation,' its duration was the last five minutes we were all in the room when the Company 'discovered' Davis' holster." Gronek's letter continued:

> there were several of the usual closing salutations exchanged after the matter to which you referred occurred, with no comment from the Company whatsoever about the issue. As a matter of fact, immediately after the point where you now assert becoming "fearful" and "intimidated," you simply said you would provide us some future dates the next day and were grateful for canceling the previously scheduled second day due to your need to travel to California and avoid the coming snowstorm.
>
> Having said that, let me also inform you that neither myself, Mr. Helfer, or Mr. Morris, were aware of Davis having a firearm on him prior to your committee pointing it out . . . . [W]e agree with you that having a firearm in collective bargaining is totally unacceptable.
>
> Had you discussed this with us at the meeting or called me prior to issuing your indignant letter, we would have told you that we had already instructed Mr. Davis that having a gun with him at collective bargaining is not allowed and would not be permitted at any subsequent meetings and the Union can assure you and your committee that it has nothing to fear from Mr. Davis or any other committee members carrying a firearm to negotiations again. We would like to receive the same assurance from the Company.
>
> Please provide us with promised dates of future negotiations.

Silbergeld responded that same day, February 26, proposing dates for bargaining in March and April. Silbergeld's letter then stated:

> The Company is prepared to meet with the Union on the above dates. We will not, however, attend under any circumstances if Jerry Davis is on the Union's negotiating team. Accordingly we would request your confirmation that he will not be. Mr. Davis' conduct, however, has made it impossible for the Company's team to continue negotiations in good faith. We recognize, of course, the Union's right to select the negotiating team it wants. Accordingly, if another employee from the Huntsville facility will be attending when we next meet, he should notify the Company that he will not be able to perform scheduled work on the day(s) designated.

The next day, February 27, Ready Mix filed an unfair labor practice charge with Region 10 of the Board, signed by Silbergeld, alleging that the Union engaged in bad-faith bargaining in violation of the Act because

> It allowed a representative on its bargaining team (the Shop Steward at the Employer's facility) to participate in the negotiations while wearing a firearm. That representative admitted carrying a weapon "all the time" because "there are a lot of crazies out there." Teamsters Local No. 402 condoned the conduct of its bargaining team member. By intimidating and harassing conduct, the Union engendered such ill will among members of the Employer's representatives as to render good faith bargaining impossible as long as the gun-toting representative remains on the Teamsters Local No. 402 bargaining team.[24]

Before this series of letters, Gronek had talked to Davis, and told him that the Employer was "having an issue of being in fear for their life." Davis testified that Gronek said that he told the Employer that Davis would not bring the gun to negotiations and "that they were fine." However, the next day—presumably after receiving the above correspondence—Gronek called Davis back and told him that the Employer was refusing to meet with Davis at bargaining.

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[24] In dismissing the charge on May 21, the Regional Director wrote:

> **Decision to Dismiss:** Your charge alleges the Union violated section 8(b)(3) of the Act by allowing a representative on its bargaining team to participate in contract negotiations while wearing a firearm. After careful review, I conclude that the investigation revealed no evidence that any threats were made, nor any threatening conduct engaged in, by any union official. Nor is there any allegation or evidence that the possession of the firearm constituted a violation of any law concerning the possession of a firearm. Furthermore, the investigation established that the Union addressed the Employer's concern by instructing the representative to refrain from bringing a firearm to future bargaining sessions, and that the representative and the Union provided assurances to the Employer in this regard. There is no evidence of any action or inaction by the Union which would establish a refusal to bargain collectively.
>
> In light of the foregoing, I have concluded that the mere fact that an employee member of the Union's negotiating team had a firearm on his person during a bargaining session is insufficient to establish a violation of Section 8(b)(3) of the Act as alleged. I am, therefore, refusing to issue complaint in this matter.

After the February 24 meeting, Davis was not permitted by the Employer to return to work for approximately two weeks. Based on Davis' statement in the negotiating meeting that he "always" carries a firearm, the Employer suspended Davis from work while it conducted an investigation into whether he had ever brought a weapon to work. Davis denied having ever brought a weapon to the workplace and the investigation did not reveal anything different. Based on notes of the investigation placed into evidence Davis reiterated that he was "fine" not bringing a weapon to further negotiations. Davis also admitted in the investigation (and in testimony at trial) that he had carried his weapon with him during the first negotiating session January 13, although it went unobserved by anyone. Davis was reinstated with backpay after approximately two weeks. No disciplinary offense was assessed against him.

Email correspondence between Silbergeld and Gronek during the first week of March led to an agreement to meet April 14, without Davis. The Union's agreement to meet was in the face of the Employer's maintenance of its position that it would not meet to bargain with the Union if Davis was present. The Union agreed to meet in Davis' absence, sending an email to Silbergeld on March 7 stating that "While we do not agree that he Company has any cause to exclude Jerry Davis from negotiations, we will agree to meet without him pending the Company's investigation."

Gronek testified that he thought—he wasn't sure if O'Reilly said something to suggest this or it was just an assumption on his part—that after the investigation concluded and Davis was returned to work, the Employer's position regarding Davis' participation in future negotiations would soften. However, in response to Gronek's email, Silbergeld wrote to Gronek (copying Morris and Helfer) on March 8 stating:

> Joe: we are on for April 14. I want to make it clear that we are not prepared to meet with Jerry Davis present under any circumstances. The investigation relates to his suspension from work, not his highly destructive conduct at the bargaining table. Put it another way, we are prepared to negotiate with any group the Union designated, but not Mr. Davis. This includes April 14 and any time thereafter. We are not getting into the same room with the man at any time in the future. So again [if] the Union is unwilling to proceed without him, that's its decision. Do whatever you need to do. The Company is ready, willing and able to proceed, and the investigation at work is not tethered to the outcome of the investigation. We are all upset and deeply disturbed because we believed the initial meetings got off on the right foot until it became evident that Jerry Davis had a gun. If the Union doesn't understand that it's not okay, that it destroyed the good will we had tried to establish, then say so to the NLRB and let's not meet until this is resolved. Not what the Company prefers, but it's the Union's call. I don't think I can be more clear.

The Employer continued to maintain its position that it would not meet in the presence of Davis. After Davis was returned by the Employer to work, on March 18, union counsel wrote and asked Silbergeld "is the Company retreating from its efforts to ban him from negotiations." Silbergeld responded the same day: "[T]he answer is 'No.' We are not meeting if Mr. Davis is going to be present." Silbergeld stated that "[t]he Company's team has decided it will not expose itself to this risk. . . . A responsible response from the Union would be: 'You will never have to confront this person again in negotiations."

This has remained the Employer's position through the date of the trial in this matter, and in preparation for each negotiating meetings occurring after February 24. The Employer has made clear that it had no objection if the Union communicated by telephone with Davis during the

meetings, but repeatedly sought confirmation that Davis would not be on the premises during the meeting, even in another room, and refused to meet without assurances that he would not be there. The Employer has made clear that it does not object, and will not refuse to meet, if the Union brings any other person—other than Davis—to negotiations, but remains adamant that it will not meet with Davis present as a union representative, as set forth in the parties' stipulation:

> for the sole reason that he admitted he carried a partially concealed gun to bargaining negotiations on February 24th, 2015 and to the previous negotiation on January 13th, 2015, and because he stated on February 24th, 2015[,] that he, "always," carries a firearm, "because there are a lot of crazies out there."

Analysis

The complaint alleges that the Respondent violated Section 8(a)(5) of the Act by its refusal to bargain with the union's chosen representative employee, Jerry Davis, present at negotiations. It is undisputed that the Respondent, in fact, since February 26, conditioned its willingness to meet to bargain on receiving assurances that Jerry Davis will not be present.

Section 7 of the Act grants employees the right to organize and then to "bargain collectively through representatives of their own choosing." And it is an unfair labor practice and violation of Section 8(a)(5) of the Act for an employer "to refuse to bargain collectively with the representatives of his employees" (subject to the provisions of section 9 of the Act).

Pursuant to this statutory footing, it is well-settled that "each party to a collective bargaining relationship has both the right to select its representative for bargaining and negotiations and the duty to deal with the chosen representative of the other party." *Fitzsimons Mfg. Co.*, 251 NLRB 375, 379 (1980), enf'd. 670 F.2d 663 (6th Cir. 1982); *Long Island Jewish Medical Center*, 296 NLRB 51, 71 (1989) ("Both unions and employers can freely choose their representatives to deal with the other in bargaining and grievance situations").

"A narrow exception to this rule is triggered when there is 'persuasive evidence that the presence of a particular individual would create ill will and make good-faith bargaining impossible.'" *Whitesell Corp.*, 357 NLRB No. 97, slip op. at 25 (2011), quoting, *KDEN Broadcasting Co.*, 225 NLRB 25, 35 (1976); *Fitzsimons*, supra (notwithstanding established rule in favor of parties having right to choose representatives, "where the presence of a particular representative in negotiations makes collective bargaining impossible or futile, a party's right to choose its representative is limited, and the other party is relieved of its duty to deal with that particular representative. The test . . . is whether there is '*persuasive evidence* that the presence of the particular individual would create ill will and make good-faith bargaining impossible'") (citation to *KDEN*, supra, omitted, emphasis in original). See, *GE v. NLRB*, 412 F.2d 512, 517 (2d Cir. 1969) ("There have been exceptions to the general rule that either side can choose its bargaining representatives freely but they have been rare and confined to situations so infected with ill-will, usually personal, or conflict of interest as to make good-faith bargaining impractical").

In assessing whether a party may refuse to deal with a chosen bargaining representative, the Board must determine whether the offending individual's "conduct was sufficiently egregious to make bargaining impossible under the above standard." *Fitzsimons Mfg.*, supra at 379. In other words, the standard is an objective one, based on an assessment of the individual's whose conduct is asserted to be the justification for the refusal to bargain. The standard is not based on the subjective asserted reactions of individual bargainers to the misconduct. Rather, the Board looks at the conduct of the representative with whom the Respondent is refusing to meet and

makes an objective determination of whether the conduct is reasonably likely create ill will sufficient to make good faith bargaining impossible. See, e.g., *King Soopers*, 338 NLRB 269, 269 (2002) ("in light of [union representative's] egregious misconduct, individuals required to deal with him in a potentially adversarial setting . . . might reasonably be preoccupied with the legitimate concern that he would react violently if his position did not prevail"); *Long Island Jewish Medical Center*, 296 NLRB at 71–71 ("an employer can refuse to deal with a union representative whose conduct has crossed over a line of permissible conduct established by the Boards and the Courts").

Thus, the Respondent is correct that "whether Respondents' witnesses feared Mr. Davis at the hearing is irrelevant" (R. Br. 43), but similarly, the case does not turn on its witnesses' testimony that its bargainers "would not feel comfortable" (Tr. 280), "would not be able to focus" (Tr. 280) and "would prefer not to" return to negotiations (Tr. 348) if Davis participated in future meetings.

In other words, evidence of the impossibility of bargaining with Davis is not demonstrated by the subjective claims of the Respondent's bargainers that bargaining with Davis is impossible. The issue is whether there is persuasive evidence that *Davis' conduct and actions* make it reasonable likely that his presence at the bargaining table would create ill will that makes collective-bargaining impossible.

In considering this question, it is useful to mention what this case is not about. It is not about a right to bring gun into collective bargaining, or the duty to bargain while your opponent possesses a side arm—no party to this litigation proposes that this should be permitted or required, nor does any party condone the possession of a weapon in negotiations. Even before the Respondent objected, the union committee, immediately upon the close of the meeting, instructed Davis that he could not bring a firearm to negotiations. He immediately agreed. The issue of whether a party can refuse to bargain because the opposing party's representative is wearing a sidearm is not before me. I do agree that there is no legitimate use for a gun in collective bargaining, an endeavor where it is not unusual for tempers to flare and heated emotions to be felt and displayed.

However, the question at bar is whether an employer may refuse to bargain in future meetings with a union representative because the union representative was seen by the employer's representative near the conclusion of a prior meeting with his personal handgun "partially concealed" on his side, where the union and the union representative agree that he will not bring his gun to future negotiations. Specifically, the issue is whether Davis, having brought a sidearm to two negotiations—which at the time caused no discernible or observable ill will, outburst, or impediment to bargaining—the Respondent is, on that basis, privileged to refuse to negotiate at all future meetings in the presence of Davis, who has committed to not bringing a gun to further negotiations.

In my view, under the circumstances here, we are a long way from a situation that would justify the Respondent's refusal to bargain with Davis going forward.

Davis has engaged in no violence. He engaged in no threats of violence, or any other threats. There is no evidence that he has *ever* done so, much less in collective bargaining. There is no evidence that he has a propensity for violence or for anger or for excitability. During the two meetings that he brought a holstered pistol, no one knew about it until near the end of the meeting when it was observed. There were zero incidents of his use of the gun to make a point, to underline a verbal statement, or any other reliance on the weapon. Davis' weapon was clearly not intended to be visible—it went unnoticed through the entire January 13 bargaining session

and was seen by one person (and not others) only in the final minutes of the February 24 session. Until the Respondent's representative asked him what he was wearing on his side, Davis did not mention that he had a weapon. He did not brandish it, reference it, or even make it obvious he was wearing it. He did not take any action to use the gun to threaten anyone. He did not make any effort to intimidate anyone. Even before the Respondent objected, the Union raised the matter with Davis, and Davis agreed to not bring the gun back to negotiations. It is as if the Respondent, having objected to Davis possessing a gun, will not take yes for an answer.

The Respondent also bases its refusal to bargain on the comments Davis made when asked at bargaining about the gun, specifically, that Davis told the negotiators that he "always," carries a firearm, "because there are a lot of crazies out there." However, I find, contrary to the suggestion of the Respondent, that Davis' statements would tend to buttress the reasonable observer's understanding that his possession of the gun was not related to collective bargaining. His statement adds to the objective evidence demonstrating that the gun was not there because the parties were negotiating. It may show bad judgment to have worn the gun (I believe it does), but Davis' comments would add to the objective observer's understanding that the gun was not to demonstrate a point in bargaining.[25]

Moreover, I reject the Respondent's argument—really an unstated suggestion—that Davis' pledge not to bring his sidearm to future negotiations is not believable because he stated on February 24, when asked about his carrying of a gun, that he "always," carries a firearm. By all evidence—and it was investigated by the Respondent—Davis (appropriately) does not carry his gun into work. Davis' choice to carry a weapon routinely on his person or in his car to protect himself from "crazies" is a matter beyond the legitimate concern of this tribunal. Many people make that choice, even if the Respondent's representatives, and many others, do not, and do not like that some do. There is no evidence at all that Davis is unwilling or not inclined to forego possessing a weapon at negotiating meetings. Both Davis and the Union have told the Respondent—from their first response on the issue—that Davis will not bring a pistol to any future negotiations.

The Respondent's position is, essentially two-fold, and neither position withstands scrutiny. First, its argument amounts to the claim that Davis' poor judgment in bringing a weapon to the negotiations, coupled with the fact that he routinely carries a gun for protection, renders him unfit, unsafe, and objectively dangerous to have in a room, and his promises to not bring the gun to negotiations not worthy of belief *because* he is the type of person who did not understand in advance that others would object to him bringing a gun into the room.

The Respondent's position is not compelling. It would be the first case, ever, where an employee who engaged in no violence, no threats, no hostile action, no *intentional* act of wrongdoing, could be barred from bargaining on the Respondent's insistence that his action created a situation so extreme that further bargaining with him was impossible *and* that his

[25]Thus (even apart from the different legal standards governing the discharge of striking employees and an employer's refusal to negotiate with a union representative), Davis' possession of his gun in these meetings was unlike the situation of the discharged striking employee who stationed himself, armed, outside a gate used by nonstriking employees (*Keco Industries, Inc.*, 301 NLRB 303 (1991)) or the striker who followed nonstrikers in his car, pulled up beside them, and brandished his weapon to the nonstrikers, displaying it, pointing to it, and making gestures suggesting that he was recording the nonstriker's license plate. *Newport News Shipbuilding*, 265 NLRB 716, 725 (1982)

unintentional error was so egregious that it precludes believing he will not repeat his mistake, notwithstanding his pledge to do so.[26]

In assessing this claim of the Respondent, it is significant that the Respondent, its employees and supervisors, have not reacted with the same intensity to the fact that Davis continues to come to work each day and performs his work without incident. Production has continued and employees and supervisors alike continue to come to work, notwithstanding that the same Davis who brought the gun to negotiations is a full-time employee present at the Huntsville plant.

The contention that bargaining is impossible with Davis present, because he is someone whose judgment is so flawed that he would bring a sidearm into a collective-bargaining meeting, is undercut significantly by the willingness and ability of the Respondent to work with Davis in the plant. Thus, the Respondent—knowing what it knows—allows its supervisors and his coworkers to come to work with Davis every day. This helps to demonstrate that there is no objective reason that the Respondent cannot engage in negotiations with Davis present. In my view, the evidence shows that making good-faith bargaining impossible is a unilateral choice that the Respondent has made based on claims about its bargainers' subjective reactions, not one objectively reasonable under the circumstances.[27]

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[26]A review of cases where the Board found an employer privileged to refuse to bargain with a particular union negotiator demonstrates how far afield those cases are from the circumstances here. See e.g. *Fitzsimons Mfg. Co.*, 251 NLRB 375, 376, 379 (1980) (employer did not violate the Act by refusing to bargain with employee who threatened to "punch [corporate personnel director] in the mouth and knock him on his ass" and then committed an unprovoked physical assault of employer's corporate personnel director to keep him from speaking during a grievance meeting), enf'd. 670 F.2d 663 (6th Cir. 1982); *King Soopers, Inc.*, 338 NLRB 269, 269 (2002) (employer did not violate the Act by refusing to bargain with employee found to have a "tendency to react violently during a confrontation," who was discharged for confrontation with supervisor in which he "angrily threw his meat hook over his shoulder narrowly missing an employee[;]. . . threw a 40 pound piece of meat into a saw (breaking its blade); threw his knife into a box; threatened his supervisor; and refused to follow the store manager's order to leave the store"; an arbitrator found that the employee "cannot control his temper" and was "capable of seriously endangering the safety of the supervisor and the employee who had been present during the confrontation" and a few months before the employee "had placed his hand over the store manager's mouth during a discussion with her"); *Sahara Datsun, Inc.*, 278 NLRB 1044, 1053, 1045 (1986) (employer did not violate the Act by refusing to bargain with employee who circulated a newsletter that, for the purpose of "retaliation," made unsubstantiated "particularly personal" allegations against named members of management asserting that they had engaged in "sex out of wedlock with two known prostitutes," "the use of cocaine with these two prostitutes," and that they had "partaken in the use and sale of cocaine," and further, the employee (without any evidence) told a loan officer at the bank that finances the employer's customer's credit applications that the employer was "falsifying the applications that the customers fill in" and that a manager was "altering the applications"), enf'd. 811 F.2d 1317 (9th Cir. 1987).

[27]The Respondent, arguing (R. Br. at 41) that the hotel meeting room in which negotiations took place was "private property," also contends that it was illegal under applicable State law for Davis to bring his gun to the hotel meeting room. The Respondent maintains that Davis' failure to understand the law "legitimates" the Respondent's refusal to meet with him thereafter. This is a variant on the argument that Davis' "bad judgment" justifies the Respondent's refusal to bargain, an argument I reject as failing to meet the standard for misconduct required by the Board to privilege a refusal to bargain. In any event, assuming that, as Davis testified, and as the

And this brings us to the gravamen of the Respondent's argument, a second argument expressed in the highest dudgeon, that works its way into nearly every aspect of the Respondent's claim—and it is an untenable argument.

The Respondent attempts to distinguish the revealing fact that it is able to *work with* Davis, while claiming it cannot *collectively bargain* with Davis, on the grounds (R. Br. at 45) that,

> [Davis'] co-workers at Respondent's Huntsville facility never had to be confronted with his firearm. The Respondent's bargaining representatives did.

In other words, unlike employees and supervisors at work, the Respondent's bargainers

> were confronted with [Davis] carrying a deadly weapon. Those representatives felt harassed, intimidated, and that their safety was compromised.

Id. at 46.

This is the nub of the Respondent's argument: that is, having seen Davis' pistol on his side, its bargainers are so "trauma[tized]" (R. Br. at 44) that they—unlike everyone else who deals with him—cannot reasonably be expected to be in a room with him and bargain. And the problem, of course—without even reaching the bona fides of Senyeri and O'Reilly's testimony about their feelings about the incident—is that in entertaining the Respondent's defense we are way down the road to giving Senyeri and O'Reilly, through their testimony of their individual, subjective, purported emotional responses, to dictate whether Davis can be present at collective-bargaining negotiations.

I do not accept it. Most relevantly, objectively, there is no evidence, no basis, no studies, no reason at all to believe that witnessing a holstered gun is likely to result in "nothing less than a post-traumatic stress syndrome," (Tr. 40) as the Respondent's counsel argued in his opening statement. See also, R. Br. at 40 (contending that the negotiators "current mental state can be likened to post-traumatic stress syndrome" because of what they witnessed); see also R. Br. at 44 (bargaining with Davis will "force them to re-live the trauma").

Stripped of the Respondent' s witnesses and counsel's assertions of the "trauma" produced at having witnessed the gun strapped to Davis' side, there is *no* objective evidence at all that Davis' conduct, behavior, or any propensity to misbehavior would impinge on future—

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evidence shows, he possessed a concealed weapons permit at the time of the negotiations, it appears that Davis is right and the Respondent wrong about Alabama State law. That law states that "no person shall carry a pistol about his person on private property not his own or under his control *unless the person possesses a valid concealed weapon permit."* Alabama Code Sec. 13A-11-52 (emphasis added). The evidence suggests that Davis has (and had) just such a concealed weapons permit, pursuant to Ala. Code Sec. 13A-11-75. In any event, whether or not Davis' past actions were consistent with state law is not a basis for determining whether the Respondent was thereafter obligated to bargain with him under the Act. *Keco Industries*, 301 NLRB 303, 304 (1991) ("state gun control laws are not controlling here. The legality of [the employee's] conduct under state laws is not dispositive of what are separate and distinct issues raised under the . . . Act"); *Catalytic, Inc.*, 275 NLRB 97, 98 fn. 13 (1998) (same, regarding anonymous telephone call found to be criminally illegal under state law).

unarmed—collective bargaining in any way. His conduct does not create objective circumstances that undermine the ability of the parties' to bargain.[28]

If Davis' mere presence causes sufficient ill will to make collective bargaining impossible, it is not because of Davis' conduct but because the Respondent has chosen to make it so. In other words, the Respondent has violated the Act by refusing to collectively bargain with the Union with its chosen representative Davis present.

CONCLUSIONS OF LAW

1. The Respondent Ready-Mix USA, LLC, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party International Brotherhood of Teamsters, Local 402 (Union) is a labor organization within the meaning of Section 2(5) of the Act and the certified collective-bargaining representative of the following appropriate unit of the Respondent's employees:

> All regular part-time and full -time drivers, loaders, dispatchers, and mechanics, employed by the Employer at its 2020 Vermont Road, Huntsville, Alabama 35806 facility; but excluding all office clerical employees, professional employees, managers, guards and supervisors as defined in the Act.

3. The Respondent violated Section 8(a) (1) of the Act, since on or about September 16, 2014, by maintaining the provision in Section B of its CEMEX Work Rule, No. 12, that contains the following language:

> The following offenses can lead to dismissal at the discretion of the management, on the first or any subsequent recurrence after the employee has been notified by his supervisor that the offense has been made. A record of this notification will be incorporated in the personnel records of the employee at the time it is given.
>
> * * * * 12. Solicitation or distribution of any non-work related materials without supervisor's permission.

4. The Respondent violated Section 8(a) (1) of the Act, since on or about September 16, 2014, by maintaining the provision in its Ready Mix USA, LLC Manual (June 10, 2010), Rules of Conduct No. 31, that contains the following language:

> Prohibited conduct which may subject an employee to disciplinary action, including immediate termination or demotion without notice or warning include, but are not

[28]The Respondent also contends that the Union has proven itself able to bargain without Davis—a circumstance the Employer's refusal to bargain with Davis forced upon the Union. The Respondent argues that this should be considered in assessing whether the Respondent's refusal to bargain violates the Act. This is a meritless argument, which ignores the autonomy of the Union to choose its representatives and the importance which the Act accords to that right. Although it is a *Noel Canning* case, I agree with and adopt the reasoning expressed in *Neilmed Products, Inc.*, 358 NLRB No. 8, slip op. at 1 (2012), rejecting an employer's claim that the union did not have a "superseding need" to have as its representative an employee terminated for picket line violence: "such evidence is irrelevant because the Board does not require a party to demonstrate a particular need for its chosen bargaining representative."

limited to, the following described conducts. The disciplinary action taken will depend upon the nature and severity of the circumstances.

* * * 31. Solicitation or distribution of unauthorized materials or products to employees or customers on Company property (emphasis in original).

5. The Respondent violated Section 8(a)(5) and (1) of the Act, since on or about January 20, 2015, by failing and refusing to provide the Union with notice and an opportunity to bargain over the effects of the implementation of the Drive-Cam system on the terms and condition of employment of the above-described unit of the Respondent's employees.

6. The Respondent violated Section 8(a)(5) and (1) of the Act, since on or about January 20, 2015, by failing and refusing to provide, and unlawfully delaying the furnishing of, information regarding Drive-Cam requested by the Union.

7. The Respondent violated Section 8(a)(5) and (1) of the Act, since on or about February 26, 2015, by failing and refusing to collectively bargain with the Union, as the certified collective-bargaining representative of the above-described unit, by refusing to meet and bargain with union representative Jerry Davis.

8. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent maintains unlawful employee solicitation and distribution work rules, the Respondent shall be ordered to revise or rescind the unlawful rules. This is the standard remedy to assure that employees may engage in protected activity without fear of being subjected to an unlawful rule. See *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369, 374 U.S. App. D.C. 360 (D.C. Cir. 2007). As stated there, the Respondent may comply with the order of rescission by reprinting the work rules and rules of conduct without the unlawful language or, in order to save the expense of reprinting the whole manual it may supply its employees with inserts stating that the unlawful rules have been rescinded or with lawfully worded rules on adhesive backing that will correct or cover the unlawfully broad rules, until it republishes the manual without the unlawful provisions. Any copies of the manuals that include the unlawful rules must include the inserts before being distributed to employees. Id. at 812 fn. 8.

The allegations (each admitted by the Respondent) concern (1) the "CEMEX work rules" maintained by the Respondent Ready Mix and (2) the Ready Mix USA, LLC Manual maintained by the Respondent. Based on O'Reilly's testimony, I have concluded that the Ready Mix manual, with its offending language, was distributed to employees at all Ready-Mix locations. (Tr. 286–287, 288–289.) As to the CEMEX work rules, there is no evidence of their distribution, but, as I have found, they are maintained on the intranet site, and available by request (Tr. 289) at all CEMEX facilities which include the Respondent's facilities. Given this, it is appropriate that the remedy and notice posting in this case extend to each of the Respondent's facilities where the unlawful rules have been or remain in effect. *Long Drug Stores California*, 347 NLRB 500, 501 (2006); *Guardsmark*, supra at 812; *Guardsmark, LLC v. NLRB*, supra at 381.

Having found that the Respondent unlawfully failed and refused to bargain with the Union over the effects of the implementation of the Drive-Cam system, the Respondent shall be ordered to rescind any disciplinary actions or other effects of its implementation on the terms and conditions of employment of the Union-represented bargaining unit employees at the Respondent's Huntsville, Alabama facility. The Respondent shall be further ordered, upon request, to bargain with the Union over the effects of its implementation of the Drive-Cam system on the terms and conditions of the Union-represented employees at its Huntsville, Alabama facility.

Having found that the Respondent unlawfully failed and refused to furnish the Union with information responsive to its request as to "When how and if the videos will be reviewed" (item 4 of the Union's January 20, 2015 information request), the Respondent shall be ordered to provide the Union with that information.

Having found that the Respondent unlawfully failed and refused to collectively bargain with the Union as the certified collective-bargaining representative of the unit employees described in the foregoing decision, by failing and refusing to bargain with Union Representative Jerry Davis, the Respondent shall be ordered, upon request, to bargain with the Union as the representative of the bargaining unit employees and meet with and bargain with its designated representatives including Jerry Davis.

The Respondent shall further be ordered to refrain from in any like or related manner abridging any of the rights guaranteed to employees by Section 7 of the Act.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in each of the Employer's facility wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 16, 2014. When the notice is issued to the Employer, it shall sign it or otherwise notify Region 10 of the Board what action it will take with respect to this decision.

Extension of the Certification Year

In her brief, counsel for the General Counsel seeks as part of the remedy an extension of the certification year, citing *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962).

After the Board certifies a union as the employees' representative, Section 9(c)(3) of the Act provides that that the union's presumption of majority status cannot be challenged by a new election for a period of 12 months. 29 U.S.C. § 159(c)(3). "The Board has long held that where there is a finding that an employer, after a union's certification, has failed or refused to bargain in good faith with that union, the Board's remedy therefore ensures that the union has at least 1 year of good-faith bargaining during which its majority status cannot be questioned." *Mar-Jac Poultry*, supra.

This is not an extraordinary Board remedy. It "is a standard remedy where an employer's unlawful conduct precludes appropriate bargaining with the union." *Outboard Marine Corp.*, 307

NLRB 1333, 1348 (1992); *Accurate Auditors*, 295 NLRB 1163 (1989) ("The law is settled that when an employer's unfair labor practices intervene and prevents the employees' certified bargaining agent from enjoying a free period of a year after certification to establish a bargaining relationship, it is entitled to resume its free period after the termination of the litigation involving the employer's unfair labor practices"). The Board's remedy usually takes the form of an extension of certification for one year, although it may be for a shorter period of time, or even for a "reasonable" time." *G.J. Aigner Co.*, 257 NLRB 669 fn. 4 (1981); *San Antonio Portland Cement Co.*, 277 NLRB 309 (1985).

Notably, the Board's concern with providing this insulated period of bargaining is not limited to situations where the unfair labor practices caused bargaining to cease altogether. Other unfair labor practices, such as the failure to provide information have provided a basis for extending the bargaining obligation. See, e.g., *Accurate Auditors*, 295 NLRB 1163 (1989). Indeed, even when the parties have, notwithstanding serious unfair labor practices, managed to sign a collective-bargaining agreement, the Board is still willing to extend the certification as a remedy if the bargaining was marred by serious unfair labor practices. *Outboard Marine*, supra at 1348.

In considering the appropriateness and length of any extension of the certification period the Board has explained:

> it is necessary to take into account the realities of collective-bargaining negotiations by providing a reasonable period of time in which the Union and the Respondent can resume negotiations and bargain for a collective-bargaining agreement without unduly saddling the employees with a bargaining representative that they may no longer wish to have represent them. Various factors are considered in making such an evaluation, including the nature of the violations found, the number, extent, and dates of the collective-bargaining sessions held, the impact of the unfair labor practices on the bargaining process, and the conduct of the Union during negotiations.

Wells Fargo Armored Services Corp., 322 NLRB 616, 617 (1996) (footnotes and internal quotations omitted).

In this case, I feel that the record simply does not provide adequate basis to conclude that an extension of the certification year is warranted based on the Respondent's unfair labor practices. In reaching this conclusion, I do not intend to minimize the significance of the unfair labor practices found. However, although there are a number of 8(a)(5) findings, their significance to overall bargaining is unclear. Notably, no evidence was adduced to as to the substance of the collective bargaining—we know that the parties continued to meet regularly (if not particularly frequently) during the period from January 2015 to the date of the trial in early July 2015. There is no evidence at all that the failure of the parties to meet for the first time until mid-January 2015—three and a half months after certification—was attributable to the Respondent, much less to its unfair labor practices. The failure to bargain over the effects of Drive-Cam implementation and the failure and/or delay in providing requested information about Drive-Cam, while unlawful, is a cabined offense—it certainly does not represent a general failure to bargain that could be said to have undermined bargaining overall. I am hesitant to make the same point about the Respondent's refusal as of February 26 to bargain with the Union with Jerry Davis present—it is no more for the Board than it is for the Respondent to tell the Union whether or not it needed Davis in order to effectively bargain. But the fact is, there is simply no evidence and no obviousness that the Respondent's unlawful conduct in this case actually undermined the bargaining process. There is great offense to be taken in the Employer's appropriation to itself of

the determination of which union representatives it would bargain with—the autonomy of the employees' and union's decisionmaking in this regard is legitimately understood as sacrosanct—barring unusual circumstances. It is a fundamental principle of the Act, reflected in the statutory language. However, I note that the General Counsel's request for an extension of the certification year, while briefly mentioned at trial (Tr. 28) and in the General Counsel's posttrial brief (G.C. Br. at 56), the argument is not developed. There is no explanation of why the unfair labor practices at issue warrant extension of the certification year in this case. Without more, I am unwilling to find that an extension of the certification year is warranted.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[29]

ORDER

The Respondent Ready Mix USA, LLC, Huntsville, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Maintaining the provision in Section B of its CEMEX Work Rule, No. 12, that contains the following language:

> The following offenses can lead to dismissal at the discretion of the management, on the first or any subsequent recurrence after the employee has been notified by his supervisor that the offense has been made. A record of this notification will be incorporated in the personnel records of the employee at the time it is given.
>
> * * * * 12. Solicitation or distribution of any non-work related materials without supervisor's permission.

(b) Maintaining the provision in its Ready Mix USA, LLC Manual (June 10, 2010), Rules of Conduct No. 31, that contains the following language:

> Prohibited conduct which may subject an employee to disciplinary action, including immediate termination or demotion without notice or warning include, but are not limited to, the following described conducts. The disciplinary action taken will depend upon the nature and severity of the circumstances.
>
> * * * 31. Solicitation or distribution of <u>unauthorized</u> materials or products to employees or customers on Company property (emphasis in original).

(c) Failing and refusing to provide the Union with notice and an opportunity to bargain over the effects on its Union-represented

[29]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

bargaining-unit employees at the Huntsville, Alabama facility, of the decision to implement the Drive-Cam system.

(d) Using the Drive-Cam system as part of its disciplinary program or other programs that affects the terms and conditions of the Union-represented employees at the Huntsville, Alabama facility without first notifying the Union and offering an opportunity to bargain.

(e) Failing and refusing to furnish the Union with relevant and requested information as to how and if videos taken with the Drive-Cam system will be reviewed.

(f) Unreasonably delaying in furnishing the Union with relevant and requested information as to the identity of Drive-Cam's manufacturer, the method and documentation of the images retrieved by the Drive-Cam cameras, and information regarding whether Huntsville is the only location at which the Respondent utilizes Drive-Cam.

(g) Failing and refusing to collectively bargain with the Union as the certified collective-bargaining representative of the Union-represented bargaining unit employees at the Respondent's Huntsville, Alabama facility, by failing and refusing to meet or bargain with union representative Jerry Davis.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Rescind the provision in Section B of its CEMEX Work Rule, No. 12, that contains the following language:

> The following offenses can lead to dismissal at the discretion of the management, on the first or any subsequent recurrence after the employee has been notified by his supervisor that the offense has been made. A record of this notification will be incorporated in the personnel records of the employee at the time it is given.
>
> * * * * 12. Solicitation or distribution of any non-work related materials without supervisor's permission.

(b) Rescind the provision in its Ready Mix USA, LLC Manual (June 10, 2010), Rules of Conduct No. 31, that contains the following language:

> Prohibited conduct which may subject an employee to disciplinary action, including immediate termination or demotion without notice or warning include, but are not limited to, the following described conducts. The disciplinary action taken will depend upon the nature and severity of the circumstances.

* * * 31. Solicitation or distribution of unauthorized materials or products to employees or customers on Company property (emphasis in original).

(c) Furnish all current employees employed at each facility for which the foregoing rules were maintained with inserts for its CEMEX Work Rules and Ready Mix USA LLC Manual that (1) advise that the unlawful provisions have been rescinded or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or publish and distribute to employees at the applicable locations revised copies of these documents that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

(d) Within 14 days from the date of this Order, rescind any discipline resulting from implementation of Drive-Cam or other effects of its implementation on employee terms and conditions of employment; and within 3 days thereafter, notify any affected employee that this has been done and that the discipline will not be used against them in any way.

(e) Notify and provide the Union an opportunity to bargain before implementing any disciplinary measures or other effects on employee terms and conditions of employment resulting from implementation of the Drive-Cam system at the Huntsville, Alabama facility.

(f) Provide the Union with relevant and requested information as to how and if videos taken with the Drive-Cam system will be reviewed.

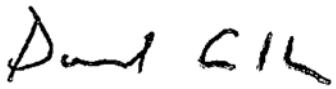
(g) Upon request, bargain with the Union as the designated collective-bargaining representative of the Union-represented employees at the Respondent's Huntsville, Alabama facility, and meet with and bargain with the Union's designated representatives including union representative Jerry Davis.

(h) Within 14 days after service by the Region, post at each of its facilities copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 16, 2014.

[30]If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(i) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 15, 2015



David I. Goldman
U.S. Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain work rules that contain the following language:

> The following offenses can lead to dismissal at the discretion of the management, on the first or any subsequent recurrence after the employee has been notified by his supervisor that the offense has been made. A record of this notification will be incorporated in the personnel records of the employee at the time it is given.
>
> * * * * 12. Solicitation or distribution of any non-work related materials without supervisor's permission.

WE WILL NOT maintain rules of conduct that contain the following language:

> Prohibited conduct which may subject an employee to disciplinary action, including immediate termination or demotion without notice or warning include, but are not limited to, the following described conducts. The disciplinary action taken will depend upon the nature and severity of the circumstances.
>
> * * * 31. Solicitation or distribution of <u>unauthorized</u> materials or products to employees or customers on Company property (emphasis in original).

WE WILL NOT fail and refuse to provide the Union with notice and an opportunity to bargain over the effects on our union-represented employees at our Huntsville, Alabama location of our implementation of the Drive Cam system.

WE WILL NOT use the Drive-Cam system as part of our disciplinary program or other programs that affect the terms and conditions of the Union-represented employees at the Huntsville, Alabama facility without first notifying the Union and offering an opportunity to bargain.

WE WILL NOT fail and refuse to provide the Union with relevant and requested information about the Drive-Cam system.

WE WILL NOT unreasonably delay furnishing the Union with relevant and requested information regarding the Drive-Cam system.

WE WILL NOT fail and refuse to collectively bargain with the Union as the representative of employees at our Huntsville, Alabama facility through its designated representatives including union negotiator Jerry Davis.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL Rescind the provision in Section B of our CEMEX Work Rule, No. 12 that contains the following language:

> The following offenses can lead to dismissal at the discretion of the management, on the first or any subsequent recurrence after the employee has been notified by his supervisor that the offense has been made. A record of this notification will be incorporated in the personnel records of the employee at the time it is given.
>
> * * * * 12. Solicitation or distribution of any non-work related materials without supervisor's permission.

WE WILL Rescind the provision in our Ready Mix USA, LLC Manual (June 10, 2010), Rules of Conduct No. 31 that contains the following language:

> Prohibited conduct which may subject an employee to disciplinary action, including immediate termination or demotion without notice or warning include, but are not limited to, the following described conducts. The disciplinary action taken will depend upon the nature and severity of the circumstances.

WE WILL provide all current employees employed at any of our facilities for which the foregoing rules were maintained with inserts for the CEMEX Work Rules and Ready Mix USA LLC Manual that (1) advise that the unlawful provisions have been rescinded or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or publish and distribute to employees at the applicable locations revised copies of these documents that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

WE WILL, within 14 days, remove from our files any reference to discipline of any employee that was an effect of the implementation of the Drive-Cam system, and within 3 days thereafter, WE WILL notify any affected employee that this has been done and that the discipline will not be used against them in any way.

WE WILL, notify and provide the Union an opportunity to bargain before implementing any disciplinary measures resulting from the implementation of the Drive-Cam system at our Huntsville, Alabama facility.

WE WILL provide the Union with relevant and requested information as to how and if videos taken with the Drive-Cam system will be reviewed.

WE WILL, upon request of the Union, bargain with the Union as the designated collective-bargaining representative for the certified-bargaining unit of our employees at the Huntsville, Alabama location and meet and bargain with the Union's designated representatives including union representative Jerry Davis.

READY MIX USA, LLC

(Employer)

Dated _____ By _____

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

233 Peachtree Street N.E., Harris Tower, Suite 1000, Atlanta, GA 30303-1531

(404) 331-2896, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/10-CA-140059 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (404) 331-2870.